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ABSTRACT

Conducted to investigate copyright questions that have arisen from the development of new communications technologies which were not foreseen when the copyright law was rewritten in 1976, these hearings are particularly concerned with the areas of low-power television (LPTV) and satellite communications. Following session opening remarks, statements are provided from: (1) Ralph Oman, Register of Copyrights and Assistant Librarian of Congress; (2) Richard G. Hutcheson III, Community Broadcasters Association (secretary-treasurer); (3) Richard L. Brown, Satellite Television Industry Association, Inc./SPACE (general counsel); (4) Jack Valenti, Motion Picture Association of America (president); (5) Edward L. Taylor, Tempo Enterprises, Inc. (president and chief executive officer) on behalf of Southern Satellite, United Video, Inc., and Eastern Microwave, Inc.; (6) James P. Mooney, National Cable Television Association (president); and (7) Preston Padden, Association of Independent Television Stations (president). Letters are also included from: (1) Representative Robert W. Kastenmeier and Senator Charles McC. Mathias, Jr.; (2) Dorothy Schrader; and (3) Richard L. Brown. A program license agreement between Viacom Enterprises and KOKI-TV, Tulsa, Oklahoma is also included. Appendices include the text of House of Representatives Bills 3108, 5126, and 5572; House Report No. 99-615 and Public Law 99-397 relating to LPTV/copyright; materials relating to earth station/copyright provided by witnesses from the Copyright Office, the National Cable Television Association, the Satellite Television Viewing Rights Coalition, Inc., the National Association of Broadcasters, and the Association of Independent Television Stations, Inc.; and letters relating to earth station/copyright from the Honorable Timothy Wirth, Anthony Castelli, Edwin M. Durso, and Douglas A. Riggs. (KM)

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COPYRIGHT AND NEW TECHNOLOGIES

ED285598

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST AND SECOND SESSIONS

ON

COPYRIGHT AND NEW TECHNOLOGIES

NOVEMBER 20, 1985, AND AUGUST 7, 1986

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COPYRIGHT AND NEW TECHNOLOGIES

WEDNESDAY, NOVEMBER 20, 1985

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Mazzoli, Boucher, and Moorhead.

Staff present: Michael Remington, chief counsel; Deborah Leavy, counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. **Kastenmeier**. The committee will come to order.

Without objection, the subcommittee will permit today the meeting to be covered, in full or in part, by television or radio broadcasts and/or still photography, pursuant to rule V of the committee rules.

This morning, the subcommittee turns its attention to the subject of copyright policy issues arising from new communications technologies.

Our hearing today is an outgrowth of the subcommittee's hearings during the 98th Congress on copyright and technological change, and the Congressional Copyright and Technology Symposium held last year.

We now continue our inquiry into copyright questions that have risen from the development of new communications technologies which were certainly not foreseen when the copyright law was rewritten in 1976.

Two areas of concern involve low-power television and satellite communications. Low-power television is a new service authorized by the Federal Communications Commission in 1982, and is designed to provide local television service in markets underserved by conventional television.

Ultimately, such low-power television could serve communities such as local radio stations serve such communities today.

However, existing copyright law creates some confusion with respect to transmitting local low-power television station signals via cable television, because the law can be construed as defining such signals as distant signals, subjecting them to royalty fees, thereby limiting the ability of these low-revenue stations to provide television service.

Consequently, I have introduced legislation, together with Congressman Boucher, that will clarify that low-power television is not to be subjected to copyright royalty fees when retransmitted by cable television within certain defined limits.

That bill, H.R. 3108, is on the table.

[Copy of bill H.R. 3108 is reprinted in app. I.]

Mr. **Kastenmeier**. The Earth stations, known as satellite dishes, are being used by people in various areas of the country because they are not, frankly, served by cable television. It is obviously too costly to provide cable service; it is too difficult to stretch cables along country roads. It is almost as difficult as electric service was 50 years ago in rural areas.

So the viewing interests of rural families are especially implicated here. Also, in some regions, the hilly nature of the terrain makes it difficult for people to get good TV signals off the air.

Individuals in these areas, therefore, are in some cases buying dishes—in increasing numbers—to enable them to receive programming directly from satellites.

Some 60,000 Earth stations are sold each month, we are told, and industry officials estimate that approximately 1.5 million dishes out there will multiply to perhaps as many as 10 million by the year 1990.

The Communications Policy Act, passed by the 98th Congress, legalizes ownership and use of Earth stations. It also encourages the development of scrambling systems as one means of gaining protection for the commercial integrity of satellite distribution systems under communications law.

By its expressed terms, the cable deregulation legislation did not affect copyright. Nevertheless, questions concerning copyright implications of Earth stations, including their impact on cable compulsory licenses, have been raised.

And so, these questions and others related to new technology will be explored by the subcommittee today.

Our leadoff witness this morning is the new Register of Copyrights, Ralph Oman. This is Ralph's first appearance before the subcommittee, and it is a very great pleasure to welcome him.

He, of course, is no stranger to this subcommittee, having served for many years as counsel to the Senate Judiciary Subcommittee; in fact, prior to being named Register, Ralph Oman was the chief counsel of our sister Senate subcommittee, the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights.

I think all of us join in congratulating Ralph Oman on his new job. We look forward to working closely with Mr. Oman during his tenure in office. I note that you are—just historically—the youngest Register of the Copyright Office. We hope that job does not prematurely age you.

We greet you, and we ask you to come forward. I note that you have a comprehensive, 60-page statement, which is more than we would ask anybody else to contribute to us. If you would summarize it, I will commend for reading the Register's 60-page statement, and it will appear in the record, without objection.

Mr. Oman, you might wish to introduce your colleagues, although they are well-known to this committee, for the record.

TESTIMONY OF RALPH OMAN, REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, AND PATRICE LYONS, SENIOR ATTORNEY-ADVISER

Mr. **Oman**. Thank you very much, Mr. Chairman.

It is a pleasure to be here. On my right, your left, we have the General Counsel of the Copyright Office, Dorothy Schrader; and on my left, your right, we have Patrice Lyons, a Senior Attorney-Adviser in the General Counsel's office.

I am pleased to appear before you today on the general subject of the new communications technologies and their impact on the copyright laws, and on the specific proposal to clarify the copyright status of low-power television signals.

I will discuss H.R. 3108 and the low-power television issue first.

When Congress enacted the Copyright Act of 1976, the retransmission of broadcast programming by cable systems was the focus of considerable attention. Many of the new distribution services were not even contemplated then; as you have mentioned, low-power television was one of those unknown services.

Last year, the cable industry asked the Copyright Office to give them guidance about the status of low-power television signals—whether or not they were local signals for purposes of computing the cable compulsory license royalties. As you know, the cable systems ordinarily pay no royalty for these local signals, only the distant signals. The Copyright Office held a hearing, and we concluded that the copyright law is, in fact, ambiguous on this point.

As you have mentioned, Mr. Chairman, you have introduced the bill, H.R. 3108. It would amend the copyright laws to clarify that low-power television signals are, indeed, local signals, and provide a clear demarcation between distant and local stations.

The Copyright Office supports enactment of this legislation, without amendment.

Mr. **Kastenmeier**. May I interrupt by saying that, in terms of the history of this, on November 29, 1984, your General Counsel who sits to your left wrote us a letter (Senator Mathias and myself) which could be part of the record. That letter is a basis for the legislation introduced, and for raising again this issue, which reflected the notion that, in a sense, this should be clarified by statute, even though in the interim, the Copyright Office could make a tentative decision on the matter. For purposes of clarification, ultimately the statute ought to be changed.

Mr. **Oman**. Fine, and we will do what we can to help you move that legislation toward ultimate passage.

Now, I would like to turn to the new communications technologies and their impact on the copyright law.

Earlier, Mr. Chairman, you were mentioning the history of television. Advertiser-supported, over-the-air broadcast television, back in the early fifties, was considered an important innovation. In the seventies, with the advances in satellite technologies, we saw the introduction of a host of new ways to distribute video and audio programming to the public.

Under the leadership of Charlie Ferris, the Federal Communications Commission unleashed new forces in the communications industry, including the use of satellites to transmit cable programming.

And just recently, the FCC has given the green light to direct-to-home satellite services, the latest advance being the use of fixed satellites to transmit video programming to owners of domestic receive-only Earth stations, known in the trade as satellite dishes.

Besides encouraging the rapid increase in the use of satellites to distribute information and entertainment programming to the public, the Commission has also nurtured the development of PACE services.

These services are a combination of nonsatellite and satellite technologies, relying primarily on terrestrial means of delivering the signals to the consumers; they include subscription television, multi-point distribution, MDS, satellite master antenna television, known as SMATV, and to a minor degree, teletext systems.

And they have joined conventional broadcast television in offering the public an increasingly varied selection of programming for private viewing.

In my prepared statement, I have described, in those 60 pages, the emerging distribution services.

This new bank of distribution systems greatly increases the audience for copyrighted works. Since the Copyright Act's concept of public performance is not technology-specific, the act covers all of these new distribution services.

In general, a public performance occurs if a copyrighted work is transmitted to a place open to the public or to members of the public capable of receiving the signal at different times or different places.

The mere private reception of a performance—in other words, private home viewing—is not a public performance, and therefore, does not now give rise to copyright liability.

Certain public performances are exempt or subject to other limitations, which I won't get into here. While certain specific new technologies fall within an act's many exemptions and limitations, these are not always clear.

For example, I can't say for sure whether or not satellite master antenna systems are eligible for the cable compulsory license. The law on this point isn't clear.

My prepared statement discusses the other copyright policy issues raised by these new technologies. They include the unauthorized private reception of copyrighted works, the scrambling of signals to protect proprietary interests, and to inhibit commercial piracy, the piracy of U.S. satellite signals in foreign countries that fall within the satellite's footprint, and the transmission of data bases.

We raise many more questions than we answer in the prepared statement, and I hope you find that useful in getting the debate rolling.

Historically, the copyright law has played a major role in ensuring the continued availability of video and audio programming.

The current proposal to amend the communications law to declare a moratorium on scrambling of signals or the proposal to establish a compulsory license to guarantee access to signals, do not take this long copyright history into account.

The copyright law is clearly a proper vehicle to deal with the issues raised by the private reception of satellite-delivered programming.

I urge the subcommittee to study these issues from that unique copyright perspective, not just to consider it a matter of communications law. I suspect this is the subcommittee that will do that.

Mr. Chairman, the Copyright Office stands ready to help you and the members of this subcommittee in your efforts to adapt the copyright system to these miraculous new technologies. And I wish to extend my personal offer of assistance.

Ms. Schrader, Ms. Lyons and I would be pleased to answer any questions. We have divided up the various technologies among us, and we will respond to your questions as appropriate.

Thank you very much.

[The statement of Mr. Oman follows:]

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN OF CONGRESS FOR COPYRIGHT SERVICES

BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE
HOUSE COMMITTEE ON THE JUDICIARY
99th Congress, First Session
November 20, 1985

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today on the general subject of the impact on the copyright law of new communications technologies, and on the specific proposal to clarify the copyright status of low power television signals (H.R. 3108).

A variety of new methods for transmitting copyrighted works to the public has been developed in recent years by a combination of new technologies (especially, the proliferation of satellites, improvements in earth receiving equipment, and improvements in addressable converters) and by new regulatory policies (e.g., changes in spectrum allocation, new authorizations for direct broadcasting services, multichannel multipoint distribution services, and low power television, etc.) After commenting on the specific issue of low power television and H.R. 3108, we will 1) note several copyright policy issues relating to the transmission of copyrighted works; 2) review the basic provisions of the copyright law and of the Cable Communications Policy Act of 1984 in the context of these issues; and 3) describe and briefly review several of the new programming transmission services such as direct broadcast satellites (DBS), multipoint distribution services (MDS), multichannel multipoint distribution services (MMDS), satellite master antenna systems (SMATV's), and teletext distribution systems. The transmission service may involve satellite technology alone or terrestrial technology alone, or frequently a combination of the two. Under the United States Copyright Act, while different exemptions or limitations may apply to certain transmission services, the concept of public performance 1/ appears broad enough to cover the transmission of copyrighted works to the public by each of the services surveyed in this statement.

I. LOW POWER TELEVISION (LPTV)

In 1982, the Federal Communications Commission (FCC) authorized the establishment of low power television stations entitled to originate programming. See 47 Fed. Reg. 21468 (1982), on recon., 48 Fed. Reg. 21478 (1983). By 1984, 117 low power television stations had gone on the air and an additional

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1. "Public performance" under the 1976 Copyright Act broadly includes acts which "transmit or otherwise communicate a performance or display of the work to...(a public place)... or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times." 17 U.S.C. §101. The relevant definitions of "publicly", "perform" and "to transmit" are not technology-specific, and include "not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public." H.R. 94-1476, 94th Cong., 2d Sess. 63 (1976) ("1976 House Report").

259 construction permits were granted. Lotteries for new construction permits are held every month; the FCC is expected to grant up to 4,000 of these permits.

Section 111(c) of the Copyright Act of 1976, title 17 of the United States Code, established a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. This compulsory license is subject to various conditions, including the requirements that cable systems file Statements of Account semi-annually and pay statutory royalty fees in accordance with section 111(d)(2), as adjusted by the Copyright Royalty Tribunal in accordance with section 801(b)(2). The broadcast station whose signal is retransmitted must be licensed by the FCC (or by the equivalent governmental authority in Canada or Mexico).

Under the cable compulsory licensing system, the Statements of Account and statutory royalties which cable companies submit to the Copyright Office must reflect and identify the carriage of "local" and "distant" signals. The difference is critical since large cable systems whose semiannual gross receipts exceed $214,000 compute their copyright royalties beyond the minimum fee 2/ on the basis of their carriage of "distant" signals. If the LPTV signals are regarded as "local" for copyright purposes, the large cable systems could carry them without any additional royalties above

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2. All cable systems pay a minimum fee for the privilege of making secondary transmissions, irrespective of gross receipts or actual distant signal carriage. 17 U.S.C. 111(d)(B)(i), (C) and (D).

the minimum fees. As the agency responsible for the filing of Statements of Account and the collection of royalties, the Copyright Office was asked by the interested remitters how LPTV stations should be regarded for purposes of calculating royalties.

Since the Copyright Act was enacted in 1976, the relevant section 111(f) definition refers to the type of television broadcast station that the FCC required cable systems to carry on April 15, 1976. Under one interpretation of the Act, since the low power television station category did not exist in 1976, such stations could not be considered "must-carry" stations under the FCC rules in effect on April 15, 1976.[3] Even before the court mandated elimination of the must-carry rules, the FCC did not require cable retransmission of low power television stations.

In response to requests by LPTV representatives the Copyright Office held a public hearing on October 12, 1984, for the purpose of eliciting comment on the correct interpretation of the Copyright Act as it relates to the status of signals of low power television stations retransmitted by cable systems.

LPTV and cable systems representatives argued that LPTV signals were local for copyright law purposes, either because in terms of signal strength and geographical coverage they were clearly local, or because LPTV should be analogized

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3. 1976 House Report at 99.

to translator stations which were recognized as local in 1976, and that less than full power television stations must be considered local.

The Copyright Office concluded, on the basis of the statute, the legislative history, and the administrative hearing record, that the status of low power television stations under the cable compulsory license is ambiguous. The Office suggested that legislative clarification, as discussed in comment letters filed by you Mr. Chairman and by Senator Mathias, would be welcome. Pending that clarification, the Office accepts for filing and does not question cable Statements of Account that report LPTV signal carriage as local.

Mr. Chairman, you and Senator Mathias have now introduced companion bills (H.R. 3108 and S. 1526) that would amend the Copyright Act's definition of "local service area of a primary transmitter" to clarify that LPTV signals are indeed local signals. The text of the bills is consistent with the policy objective, and the Copyright Office supports enactment. We are not aware of any opposition to the bills. Although the Motion Picture Association of America had expressed concern in written comments to the Copyright Office about the dividing line between "distant" and "local" low power stations, the text of the bill now provides a clear demarcation: the signal is local within 35 miles of the transmitter site, except where the LPTV station is located in a top fifty metropolitan area, in which case the standard is 20 miles from the transmitter site.

II. OVERVIEW OF COPYRIGHT POLICY ISSUES ARISING FROM THE TRANSMISSION OF COPYRIGHTED WORKS BY SATELLITE OR OTHER COMMUNICATIONS SERVICES

A panoply of new video and audio program distribution services has blossomed since 1976 under the fertile combination of improved communications technologies and a hospitable regulatory climate. The program services in virtually every case involve the transmission to the public of copyrighted works. In this section we identify and present an overview of actual or potential copyright issues relating to these communications developments. These issues are: unauthorized private reception, scrambling of signals, piracy of United States program signals abroad, and transmissions of databases.

A. Unauthorized private reception.

Under traditional copyright law, no liability exists for the private performance of works. Broadcasting, whether by conventional terrestrial methods or by satellite, is a public performance if the public is capable of receiving the performance, even though reception occurs in private. Moreover, the unauthorized reception of a performance, in a public place, or the further distribution of the performance, infringe the copyright in the work performed, unless there is a specific exemption, such as 17 U.S.C. 111(a)(1) or 110(5). Mere reception of a performance in a private home, however, is not an act of copyright infringement under existing copyright law.

Satellite delivery of copyrighted works either by direct broadcasting or satellite-to-cable, means that the signal containing copyrighted works may be intercepted by persons in the United States or abroad who are not part of the copyright owner's intended audience.

The use of satellites to deliver copyrighted telecommunications programming, from networks to affiliates, from program origination services to cable systems, or by direct broadcast has increased the opportunities for persons to receive the signals originated by networks or pay-television systems either prior to their first authorized terrestrial distribution or, without entering into a contract with the pay-tv supplier or his or her local outlet (usually a cable television system). These realities, occurring in a society long used to indirect payment for television programming and oriented toward maximizing access to art and information, have created major policy questions for private industry, consumer groups, the courts and the Congress.

Among the many questions are: should the copyright law protect authors and copyright owners against unauthorized reception in private of their works? Is effective protection of the merging media of distribution already emerging at the state and federal levels within the framework of telecommunications law? Can or should distinctions be made between the copyright liabilities of individuals who receive without authorization satellite derived signals and those commercial enterprises which facilitate such reception?

B. Scrambling of signals.

In order to impede unauthorized reception of their satellite borne signals--by private viewers and by those who actually "pirate" programming (by receiving and redistributing program-carrying signals for commercial gain)--some copyright holders and distributors have started to, or intend to, scramble their signals. Apart from the use of scrambling as a means of practical self-help against these activities, a question arises as to whether the encrypted and unencrypted nature of a transmission does, can or should mark an essentially proprietary boundary. While a kernel of this aspect of scrambling is to be found in section 111(b) of the 1976 Copyright Act, the most significant development in this regard has been the enactment of the Communications Policy Act,[4] which encourages the development of scrambling systems as one means of gaining protection for the commercial integrity of satellite distribution systems under communications law.

On the other hand, some members of the public believe they have the right to receive satellite programming, and legislation has been introduced to declare a moratorium on the scrambling of signals or to establish a compulsory license permitting access to signals. H.R. 1769 and H.R. 1840 have been introduced in this Congress to amend the new provisions of the Cable Act on interception and receipt of satellite cable programming for private viewing. H.R. 1769 would amend the Communications Act of 1934 by imposing a two-year ban on the encryption of satellite cable programming. The stated purpose of the bill would be to allow time for the establishment of effective licensing systems before encryption becomes well-established. (Some cable programming services such as Home Box Office, Inc. (HBO) are in the midst of establishing scrambling systems.)

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[4] Pub. L. 98-549.

H.R. 1840, and its Senate companion bill S. 1618, would vest the FCC with broad, new authority to create a compulsory license for the private viewing of scrambled satellite signals. The FCC would set the prices, terms, and conditions for the receipt of such signals. The bill would also prohibit price discrimination against backyard dish owners compared with cable subscribers and would prohibit any practices that would force dish owners to lease or purchase decoding equipment from particular authorized sources.

The cable industry and cable programmer representatives contend that these bills would effectively preclude the major options established by the Cable Communications Policy Act of 1984 for product control and security of pay television programming by the program suppliers. They argue that it is reasonable to require dish owners who receive pay television programming to pay a fair price for it just as cable subscribers do. They stress that some satellite programmers have developed marketing plans to tap the backyard dish owners' market.5/

Vexing policy questions arise out of the possibility of satellite signal encryption: should the copyright law be amended to ensure public access to satellite-delivered copyrighted materials? How could this be done? Would compulsory licensing systems assuring remuneration to program suppliers in exchange for direct consumer access to satellite signals be compatible with authors' rights? Would such a system amount functionally to a compulsory license-supported DBS system? Who would share in any such system of royalty collection? Should the encryption of signals become a more inclusive and express dividing line between the rights of viewers to privately perform works and the public performance rights of authors and copyright holders? Is the evolution of state and federal law with respect to protection of communications services complementary or in conflict, one with the other?

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5. Scrambling proposals include mechanisms through which backyard dish owners may purchase pay television, either through designated local agents of the satellite programmers (the local cable systems) or directly from the programmers themselves (via an 800- telephone number). Arguably, the economics of the industry, which favor maximization of subscribers to the programming, would provide strong incentives to programmers to establish fair and reasonable rates for access to the programming by backyard dish owners that would be comparable to the rates charged cable subscribers for the same programming.

Insofar as copyrightable materials are concerned, should a national regime of protection be preferred given the preemption of state power in the 1976 Copyright Act?

C. Piracy of U.S. signals in foreign countries.

Unauthorized interception and distribution in foreign countries of U.S. satellite signals containing copyrighted works has been a matter of concern by U.S. interests for many years. The problem is particularly acute in the Caribbean area, Central America, and Canada to the extent these areas fall within the "footprint" of U.S. domestic satellites, transmitting programming to the United States public. Ratification of the Brussels Satellite Convention may encourage other countries to join the Convention and protect against unauthorized distribution of signals. While the Convention would serve as an effective legal framework for resolution of the problem of unauthorized reception and redistribution of program-carrying signals, it is not responsive to the question of unauthorized reception in homes. Of perhaps future relevance is the express exclusion of direct broadcast satellite signals from the scope of the Convention.

U.S. copyright owners have sought and obtained provisions in trade legislation and the Caribbean Basin Initiative which require some assurance by the foreign beneficiaries of the legislation that they adequately protect U.S. intellectual

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6. CBERA expressly addresses the problem of satellite signal piracy by requiring government entities in beneficiary

property, including copyrights.6/ This legislation and others concerned with access to the U.S. market by foreign traders condition the availability of preferential trade benefits upon the recipients' "adequate and effective" protection of intellectual property.

To what extent do the two major international copyright conventions7/ and the Brussels Satellite Convention afford adequate protection for U.S. copyrighted works against unauthorized reception and distribution of satellite signals? Do trade-based reciprocal measures hold significant promise for ensuring adequate protection for U.S. copyrighted works in foreign countries, or are they less promising in the long-run than efforts to ensure full compliance with existing copyright and satellite conventions and efforts to encourage wider acceptance of these conventions? Should U.S. efforts be directed toward development of domestic copyright and communications law policies that would ensure full compensation for satellite transmission of copyrighted works at the source of the transmission?

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states to cease rebroadcasting, without authorization, program-carrying satellite signals, as a mandatory eligibility criterion. Pub. L. 98-67, Secs. 212(b)(5).

7. The Universal Copyright Convention, of which the United States is a member, and the Berne Convention for the Protection of Literary and Artistic Works, of which the United States is not a member.

D. Regulation of programming and other services not considered "cable services."

While the Cable Communications Policy Act of 1984 improves considerably the legal structure for the furnishing of "cable services," it does not include within the meaning of that term "'active' information services such as at-home shopping and banking that allow transactions between subscribers and cable operators or third-parties. Similarly, a cable service may not provide subscribers with the capacity to communicate instructions or commands to software programs such as computer or video games or statistical packages that do not retrieve information and that are stored in facilities off the subscribers' premises."8/ The one way transmission of video, textual, data and other material is covered.

The nature and scope of protection for copyrighted databases has been questioned in recent litigation. What constitutes a "fair use" in connection with "factual" works is unsettled. The application of the exclusive rights in §106 of the 1976 Act, as well as limitations on these rights, such as that in §110(5), to new methods of transmission could usefully be studied further.

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8. Report on H.R. 4103 of the House Comm. on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 42 (1984); see also 50 Fed. Reg. 18637, 18639 (1985).

III. PROTECTION FOR SATELLITE-DISTRIBUTED PROGRAMMING UNDER THE COPYRIGHT ACT AND §§633 AND 705 OF THE COMMUNICATIONS ACT

A. Protection for program suppliers under the Copyright Act.

1. Exclusive rights

One of the exclusive rights granted to owners of copyright is the right of public performance. 17 U.S.C. 106(4). The terms "perform" and "publicly" are broadly defined in 17 U.S.C. 101, to include the transmission of a performance by any means to the public, including satellites. The Copyright Act contains certain exceptions to the right of public performance, of which the most relevant are the exemptions of sections 110(5) and 111(a), and the cable compulsory license, section 111(c)-(f).

Satellite distribution of copyrighted programming is now commonplace, either by satellite to broadcast station, or satellite to cable, links. Direct satellite broadcasting (DBS) has been authorized by the FCC, but the medium has not proved commercially viable yet.

A public performance takes place when a copyrighted work is transmitted to the public via satellite. In general, the emitting organization (a broadcast station, or a broadcast or cable program service network) is subject to full liability under the Copyright Act for authorizing the public performance. Therefore these program services occur under license from the owner of copyright. Section 111(b) of the Copyright Act provides that satellite cable programming (such as HBO, ESPN, and CNN) and other controlled access program services are subject to the copyright owner's exclusive right of public performance.

The reception and communication to the public of a performance in a public place (for example, by turning on a radio or television attached to commercial sound speakers) is a public performance and subject to liability unless one of the specific exceptions applies. The further distribution of a performance of a copyrighted work in public is also a public performance. Under these principles, the reception of satellite-distributed nonbroadcast services in a bar, motel or hotel is apparently an infringement of copyright. (The lodging exemption of section 111(a)(1) does not apply to nonbroadcast programming.) On the other hand, the private reception of a signal in a private home and without further communication to the public, would not be an infringement of copyright, since the performance is not public; this is true even if the reception is unauthorized by the copyright owner.

2. Cable compulsory license.

The retransmission of broadcast programming by a cable system is subject to the compulsory license of section 111. The statute sets the terms and rates of compensation; the rates are subject to adjustment by the Copyright Royalty Tribunal. The compulsory license has been invoked in carrying a "superstation"[9] transmitted from the broadcasting facility via satellite and then distributed to cable systems. Satellite resale carriers licensed by the FCC have been held exempt from any copyright liability for their retransmission activity under 17 U.S.C. 111(a)(3) ("passive common carrier" exemption).

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[9] Broadcast stations (such as WOR, WGN, and WTBS) transmitted nationwide to cable systems and their subscribers by means of resale satellite carriers.

The Copyright Act does not grant cable system operators per se any remedy against "theft-of-cable service" since they are ordinarily neither the creators nor the owners of the copyrighted programming they transmit. (To the limited extent that cable system operators locally originate and own the programming, they would enjoy the rights of copyright owners.)

B. Protection for program suppliers and cable operators under §§633 and 705 of the Communications Policy Act of 1984.

The Cable Communications Policy Act of 1984 (Cable Act), among other achievements, created two new private rights of action (property rights in effect) under the communications law to protect against unauthorized private reception of satellite signals under certain circumstances, and to protect against theft of cable service whether the signal is relayed by satellite or terrestrial means.

1. Unauthorized Reception of Cable Service: Section 633.

Section 633(a)(1) of the Cable Communications Policy Act of 1984 prohibits any person from intercepting or receiving "any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law."10/ While former

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10. Cable Communications Policy Act of 1984, Pub. L. 98-549, 98th Cong., 2d Sess., sec. 2, §633 (to be codified at 47

§605 of the Communications Act of 1934 also included a prohibition against the unauthorized reception of communications services, new §633 of the Cable Act is particularly tailored to the theft of cable services, and provides criminal penalties and civil remedies for violations of that section. Former §605 of the 1934 Act did not contain specific remedies for such violations.

Since there may be cases of theft of cable service that are not covered by §633, it is noted in the relevant legislative history that: "Nothing in this section [§634, H.R. 4103, became §633, Cable Act] is intended to affect the applicability of existing Section 605 to theft of cable service, or any other remedies available under existing law for theft of service."11/

The prohibition in §633 also extends to a person assisting in the interception or receipt of a communications service. Section 633(a)(2) defines the term "assist in intercepting or receiving" to include "the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system...." According to the *House Report*, it was not the intent of Congress to subject

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U.S.C. §633).

11. *Report on H.R. 4103 of the House Comm. on Energy and Commerce*, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 83 (1984). Both the Senate and House of Representatives adopted the explanations in H.R. Rep. No. 98-934, with certain amendments. *See Cable Telecommunications Act*, 130 *Cong. Rec*. S 14285 and H 12235 (daily ed. Oct. 11, 1984).

manufacturers, distributors or retailers to liability under that section if they do not provide a device or equipment "with the intent or specific knowledge that it will be used for the unauthorized reception of cable service."[12] The primary aim of subsection (a)(2) is to prevent the manufacture and distribution of so-called "black boxes" and other unauthorized converters which permit reception of cable services without payment.[13]

Penalties or remedies for violations of the prohibition in §633(a)(1) are set forth in subsections (b) and (c). The section also provides generally that any State or franchising authority may enact or enforce laws with respect to the unauthorized interception or reception of any cable or other communications service, even if the laws impose higher penalties or sanctions. The criminal penalties for violations of subsection (a)(1) of §633 are graduated. Any person who willfully violates the section may be fined not more than $1,000 or imprisoned for not more than 6 months, or both. Where the violation is not only willful, but for purposes of commercial advantage or private financial gain,[14] the person is subject to a fine of not more than $25,000 or imprisoned for not more than 1 year, or both, for the first offense, and not more than $50,000 or imprisoned for not more than 2 years, or both, for any subsequent offense.15/ In this respect, the House Report observes that "[t]he increased penalties triggered by willful violations committed for purposes of commercial advantage or private financial gain are designed in part to reach the production of devices, or sale of equipment or services, intended for unauthorized reception of services provided over a cable system."16/

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[12] Id. at 84.

[13] Id.

[14] Id. The legislative history of §705 contains explanatory language in connection with the phrase "private financial gain." 130 Cong. Rec. S 14285 (daily ed. Oct. 11, 1984). Further, the term is defined in §705(b)(5) as excluding "the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use." Courts may look to this definition for guidance in interpreting the same term in §633 of the

With respect to civil remedies, a "person aggrieved" by a violation of §633(a)(1) may bring a civil action in a U.S. district court or in any other court of competent jurisdiction. In light of the broad language of §633(c)(1): "Any person aggrieved by any violation of subsection (a)(1) may bring a civil action . . . ," it appears likely that both copyright owners and cable operators may have standing to enforce this new provision. It is not clear, however, whether the clause "as may otherwise be specifically authorized by law" in subsection (a)(1) was intended to cover rights under the Copyright

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Cable Act.

15. An amendment was made to a similar provision in §705. The word "offense" was changed to "conviction" in §705(d)(2) "in order to clarify that more than one conviction, and not a single conviction on more than one violation, is what triggers the applicability of the higher criminal penalties (which provide up to a $50,000 fine and 2 years imprisonment)." 130 Cong. Rec. S 14286 (daily ed. Oct. 11, 1984). Although the change was not made in §633, it may be argued that the intent was the same.

16. Id.

Act of 1976. The meaning of the term "any person aggrieved" was discussed in connection with the use of the term in §705(d)(3)(A) of the Cable Act. In that context, the term was viewed as covering owners of rights in programming as well as senders of the signal embodying the programming.17/

Civil remedies available under subsection (c) include temporary and final injunctions, actual or statutory damages, and full costs, including attorney's fees. With respect to the amount of damages, where a court finds that a violation was committed willfully and for purposes of commercial advantage or private financial gain, the court may increase the award of either actual or statutory damages to $50,000. In the event the court finds a violator was not aware and had no reason to believe that his acts constituted a violation of §633, the court may reduce the award to not less than $100.

2. Unauthorized Reception of Certain Communications: Section 705.

Specific provision has now been made in the Communications Act of 1934 for the protection of "satellite cable programming."18/ As defined in new §705(b), "the term 'satellite cable programming' means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to

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17. See 130 Cong. Rec. S 14288 and H 12238 (daily ed. Oct. 11, 1984).

18. The Cable Act amends the Communications Act of 1934 by redesignating former §605 as §705, and inserting "(a)" after the section designation. The Act also adds new subsections (b)-(e) at the end of the existing section.

cable subscribers." Under the scheme adopted in §705 of the Cable Act, any individual is free to intercept or receive any satellite cable programming for private viewing if the programming involved is not encrypted, and a marketing system has not been established as provided in that section. Satellite cable program suppliers are given a clear choice by this new provision: scramble their signal, or establish a marketing system for authorizing private viewing. The legislative history elaborates on the terminology used in new §705(b). With respect to the phrase "private viewing" as used in that provision, it is noted that the term does not include "any retransmission by so-called 'private cable' or 'satellite master antenna television' systems. Nor is it contemplated that an individual may redistribute programming received by his satellite equipment to the homes or residences of his neighbors. Nor is it contemplated that 'private viewing' includes display of satellite cable programming in the public area of an apartment building, condominium, or housing complex, or in taverns, restaurants or fraternal halls."19/ Further, the interception of the "satellite cable programming" must be directly from the satellite feed to come within the scope of §705(b).20/

The exemption in §705(b) applies only where the video programming transmitted via satellite is primarily intended for the direct receipt by cable operators for their retransmission

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19. 130 Cong. Rec. H 12238 (daily ed. Oct. 11, 1984).

20. Id.

to cable subscribers. With respect to closed-circuit sports and special events transmissions, it is noted in the legislative history of that provision that:

> Closed-circuit sports and special events transmissions, whether on a regular or ad hoc basis may be primarily intended for viewing by paying customers in public places where local promoters have acquired public performance rights (e.g., movie theaters, stadia, or public performance halls). If the sender of such a transmission licenses retransmission rights to certain cable operators, one must look to the facts of the case to determine whether this is the "primary" intent of the sender.21/

The Cable Communications Policy Act of 1984 does not clarify the threshold issue of what communications are covered by §705 in the first place. Section 705(a) [former §605] provides that: "This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public...."22/ The new satellite cable programming scheme in §705(b)-(e) would not come into play where the programming is "transmitted by any station for the use of the general public." In determining the meaning of the exclusionary language in §705(a) of the Cable Act, it is helpful to look to the construction of former §605 of the Communications Act of 1934. Congress observed in the legislative history of the Cable Act that former §605 provided "broad protection against

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21. Id.

22. Section 605, now §705(a), was revised in 1982; the term "broadcast" was deleted. See 47 U.S.C. §605 (1982).

the unauthorized interception of various forms of radio communications," and that there was no intent to alter "those broad protections."23/

Case law construing former §605 of the Communications Act of 1934 applied that section to subscription television, multipoint distribution and other transmission services. An earlier decision, that was recently cited by the Court of Appeals for the D.C. Circuit in reviewing the FCC's interim direct broadcast satellite regulations,24/ involved restrictions placed on the operation of a subscription music service by FM licensees.25/ In Functional Music, the court did not agree with the FCC's finding that the activities of the functional music operators constituted point-to-point communications. Referring to the definition of broadcasting in the 1934 Act, the court stressed that Functional Music's programming was of interest to the general radio audience and was specifically transmitted with the intent to reach the public generally. As noted in the DBS context, "the test for whether a particular

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23. 130 Cong. Rec. S 14287 and H 12237 (daily ed. Oct. 11, 1984).

24. See National Ass'n. of Broadcasters v. F.C.C., 740 F.2d 1190 (D.C. Cir. 1984).

25. Functional Music, Inc. v. F.C.C., 274 F.2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959); see also Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980); and National Subscription Television v. S & HTV, 644 F.2d 820 (9th Cir. 1981).

activity constitutes broadcasting is whether there is 'an intent for public distribution' and whether the programming is 'of interest to the general ... audience.'"26/

Unlike former §605, express provision has been made in amended §705 for criminal penalties and civil remedies for violations of the protections afforded by that section. Section 705(e) added by the Cable Act to the Communications Act of 1934, title 47 U.S.C., also provides that the specific remedies in §705 do not "affect any right, obligation, or liability under title 17, United States Code, any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law." With the exception of the change of the word "conviction" for "offense" in §705(d)(2), the penalties and remedies under §705 are generally the same as those described above in connection with §633. Unlike §633, however, the legislative history of §705(d)(3)(A) states clearly that owners of rights in intercepted radio communications, and not just the sender of the signal, may be a "person aggrieved" by violations of §705(a). Section 705(d)(4) does add a new remedy. This provision subjects "the importation, manufacture, sale, or distribution of equipment by any person with the intent of its use to assist in any activity prohibited by subsection (a) [of §705]" to the same penalties and remedies as a person who has engaged in such prohibited activity.

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26. National Ass'n. of Broadcasters, supra, 740 F.2d at 1201.

It is provided in §705(e) that the copyright law is not affected by that section, and the issue of who may authorize the reception of an unencrypted signal for private viewing continues to be governed by existing copyright law and contract.27/ With respect to the savings clause in §705(e) [then (d)], Congress observed that "the adoption of this provision is not intended to affect the legal status under copyright law of any technological device. Further, there is no intent being expressed with respect to the question of whether equipment capable of receiving satellite cable programming is to be considered a receiving apparatus for purpose of an exemption under 17 U.S.C. 110(5)."28/

IV. SATELLITE TECHNOLOGY AND ITS USE IN THE DISTRIBUTION OF COPYRIGHTED WORKS

Since the passage of the Copyright Act of 1976, developments in satellite technology and changes in FCC communications policy have had a marked impact on the way in which the American public receives television programming. "Superstations" like WTBS (Atlanta) or WOR (New York) are distributed nation-wide via satellite to cable links. A galaxy of new cable programming services has been created and marketed via satellite to cable systems. Radio and television broadcast networks make increased use of satellites to distribute programming to their affiliates. Only some of these

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27. 130 Cong. Rec. H 12238 (daily ed. Oct. 11, 1984).

28. Id. at H 12239.

developments were contemplated in 1976; their impact on the market for televised programming is substantial. Direct satellite broadcasting, however, although initially promising, has not proved commercially viable to date.

A. Regulatory framework.

The framework within which the FCC authorizes the operation of fixed-satellite and broadcasting-satellite services is the International Telecommunications Convention. Frequency allocations for these services must comply with the technical requirements set forth in the Convention, Radio Regulations and other relevant agreements. Article 23 of the ITU Convention requires administrations to assure the secrecy of radiocommunications.29/ The secrecy obligations of the U.S. under the Convention are generally covered in §705 [former §605] of the Communications Act of 1934 on the unauthorized publication or use of communications. With respect to the reception and use of television and radio programming that is not transmitted for the use of the general public, section 705(a) prohibits generally any unauthorized person from receiving or assisting in the receipt of any interstate or

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29. For text of article 23, see *Final Acts of the World Administrative Radio Conference* (Geneva, 1979), *reprinted in Message from the President of the United States*, Tr. Doc. No. 97-21, 97th Cong., 1st Sess., at 241 (1981) (Treaty was ratified by the U.S. on Sept. 6, 1983).

foreign communication by radio and using such communication therein for his own benefit or for the benefit of another not entitled thereto.30/

B. Current FCC Authorizations.

Of the thirteen space services listed in the International Telecommunications Union's (ITU) Table of Frequency Allocations, only two are currently of general interest in the distribution of copyrighted works embodied in television or radio programming: Fixed-Satellite Service (FSS); and Broadcasting-Satellite Service (BSS).31/ Geostationary satellites whose orbit remains approximately fixed relative to the Earth's equator are used to transmit both FSS and BSS for reception in the continental United States, the 48 contiguous States (Conus).32/ There is a direct correlation between the power radiated by a space station located on a geostationary satellite and the size and complexity of the antenna used to receive the signal on the earth's surface. The higher the satellite power, the smaller the dish antenna required for

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30. See Cable Communications Policy Act of 1984, Pub. L. 98-549, 98th Cong., 2d Sess., sec. 5, §705(a) (to be codified at 47 U.S.C. §705(a)).

31. See First Advisory Committee Report, ITU WARC ORB 1985, at 2-1 (1983).

32. For definitions of terminology used in connection with space services, see 47 C.F.R. §2.1 (1984).

reception. A recently launched satellite, GTE Spacenet's GSTAR I, is capable of delivering five channels of service to one-meter or 1.2-meter dishes.33/

Current operational domestic satellite systems in the FSS are authorized by the Federal Communications Commission (FCC) to use the frequency band from approximately 4 to 6 GHz (C-Band); and the bands from 11.7-12.2 GHz and 14-14.5 GHz (Ku-Band).34/ Satellites in the C-Band usually have about 24 transponders, while those in the Ku-Band approximately 16 transponders. The number of transponders on a satellite is generally determined by the total available bandwith and by the frequency re-use plan. With respect to BSS, the FCC regulations provide for limited sharing of the frequency band 11.7-12.2 GHz between FSS and BSS.35/ Provision has also been made for the use of the band 17.3-17.8 GHz by the fixed-satellite service for the purpose of providing feeder links to the broadcasting-satellite service.36/ Fixed-satellite service is generally a radiocommunication service between earth stations at specified fixed points. In some cases, the service includes satellite-to-satellite links.

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33. The search for ubiquity in television, Broadcasting, at 52, 56 (July 8, 1985).

34. 47 C.F.R. §2.106 (1984). For list of C-Band and Ku-Band satellites now operational, see Where the Birds are, Broadcasting, at 50 (July 8, 1985). The FCC discourages the use of terms C-Band and Ku-Band since they are not a very accurate way to describe frequency allocations.

35. 47 C.F.R. §2.106 and NG145 (1984).

36. Id. at NG140.

In anticipation of the 1983 Regional Administrative Radio Conference, the FCC adopted policies and rules for the authorization, on an experimental basis, of direct broadcast satellite service (DBS). Unlike the FSS, signals transmitted or retransmitted by space stations in the DBS service are intended for reception at multiple receiving points. In its *Report and Order* of June 23, 1982, the FCC viewed DBS service as "a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, inexpensive earth terminals."[37] The FCC amended its Table of Frequency Allocations contained in Part 2 of its regulations to permit DBS downlink operations in the 12.2-12.7 GHz band and uplink operations in the 17.3-17.8 GHz band.[38] The FCC examined the record in that proceeding and concluded that DBS could provide extremely valuable services to the American people. It found that the "possible benefits of the service include the provision of improved service to remote areas, additional channels of service throughout the country, programming offering more variety and that is better suited to viewers' tastes, technically innovative service, and expanded non-entertainment service."[39] The FCC's *DBS Order* was reviewed by the Court of Appeals for the D.C. Circuit in an action brought by the National Association of Broadcasters. The Court commended the FCC on its regulatory accommodation of this new technology and generally upheld the FCC's frequency allocation for DBS and other aspects of its interim DBS regulations. With respect to the application of certain broadcasting requirements to this new form of satellite service, however, the Court vacated the portion of the *DBS Order* "that makes broadcast restrictions inapplicable to some DBS systems...."[40]

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[37] *Report and Order in Doc. No. 80-603*, 90 F.C.C.2d 676, 677, n. 1 (1982). While the FCC considers the terms BSS and DBS as synonymous, it uses the term DBS "when discussing domestic policy matters and BSS with regard to frequency allocation matters." *Id*. Broadcasting-Satellite Service is defined in the FCC regulations as a "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public. *Note*: In the broadcasting-satellite service, the term 'direct reception' shall encompass both individual reception and community reception." 47 C.F.R. §2.1 (1984). For definition of "Direct Broadcast Satellite Service," see 47 C.F.R. §100.3 (1984).

[38] 47 C.F.R. §2.106 and NG139 (1984). The incorporation in the ITU Radio Regulations of the frequency allocation plan adopted for Region 2 of the 1983 Regional Administration Conference for the Planning of the Broadcasting-Satellite Service was accomplished at the August 1985 World Administrative Radio Conference. *See* *Broadcasting*, at 42 (Sept. 16, 1985).

An interesting new development in satellite technology and functions is the discovery in recent years that some spare capacity in what were considered space stations in the fixed-satellite service could be used to transmit directly to individual receivers. The FCC permitted this sharing of FSS and BSS services as long as the users remain within set technical parameters, *e.g.*, decibel levels. A 1982 grant by the FCC to GTE Satellite Corporation (GSAT) to lease transponders on a Canadian communications satellite in order to provide a broadcasting-satellite television service in the 11.7-12.2 GHz band formerly reserved for fixed (point-to-point) satellite service was upheld in a court challenge brought by United States Satellite Broadcasting Co., Inc. The Court found that GSAT had disclosed in its application "that it had signed an agreement to lease capacity to United States Television (USTV) which planned to provide television programming to 'small CATV [cable-TV] systems, hotels, motels, hospitals, low power TV and STV [subscription television or "pay TV"] and MDS [multipoint distribution service] operations as well as multiple and single dwellings.'"41/ It is now recognized in the United States that broadcasting-satellite service may be provided for direct-to-home reception of television and radio programming using either low or high power geostationary satellites.

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[39] 90 F.C.C.2d, at 680.

[40] *National Ass'n. of Broadcasters v. F.C.C.*, 740 F.2d 1190, 1222 (D.C. Cir. 1984).

While technically feasible, direct-to-home broadcasting has proven very costly. One of the few operational systems, United States Satellite Communications Inc. (USCI) recently filed for Chapter 11 bankruptcy protection. USCI had provided a five channel Ku-Band service since 1983 using Telesat Canada's Anik C-II. Only Hubbard Broadcasting's United States Satellite Broadcasting, Direct Broadcasting Satellite Corp., and Dominion Video Satellite are still planning to build and launch high power direct broadcast satellite systems; and the FCC has granted DBS permits to Satellite Syndicated Systems, National Christian Network, Advanced Communications Corp. and Hughes

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41. United States Satellite Broadcasting Co. v. F.C.C., 740 F.2d 1177, 1181 (D.C. Cir. 1984).

Communications Galaxy Inc.42/ Interest has been expressed, however, by many cable systems and other enterprises in providing low power direct-to-home satellite services from fixed satellites. For several months, the cable industry has actively considered plans to scramble its satellite cable programming and sell the service to owners of dish antennas. It is reported that, in the last five years, over one million home dishes have been installed, and that the number is growing "at a rate of between 40,000 and 85,000 a month."43/ The service would initially be provided over the C-Band satellites now used to transmit programming to cable systems.44/ At least one program distributor, HBO, has recently announced a marketing scheme for reception of satellite cable programming directly by individual earth station owners.45/ Eventually, the next generation high-powered Ku-Band satellites may also be used to provide programming directly to home subscribers.

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42. Direct broadcast satellites, Broadcasting, at 22 (July 1, 1985).

43. Id.

44. See, e.g., T. Girard, Cable Biz Intensifying Effort to Scramble and Market Program Services, Daily Variety, at 1 (June 7, 1985); and J. Boyle, HBO Unveils plan to Sell its Services to Home Dish Owners, Multichannel News, at 1 (May 6, 1985).

45. Multichannel News, at 3 (Oct. 21, 1985).

V. ALTERNATIVE DISTRIBUTION SYSTEMS FOR SUBSCRIPTION PROGRAM SERVICES

While the copyright status of program services offered by satellite delivery systems for cable system retransmission has been the focus of considerable attention since the first satellite resale common carrier was authorized by the Federal Communications Commission (FCC),46/ a variety of transmission systems for video and audio programming have also evolved. In recent years, the FCC has taken steps to encourage the development of alternative distribution systems, and has acted expeditiously to provide a regulatory framework for the establishment and operation of these systems. This has not always been the case. In the 1950's the FCC delayed the introduction of what has been termed "pay-TV" in an effort to protect the then existing commercial television broadcasting system. This has now changed. The trend is clearly toward opening the door to competing technologies in order to provide the viewing public with the widest possible alternatives. As noted in a recent article on communications law:

> [T]here exists today a "letting in" process. Instead of the "crabbed" protectionism of *Carroll* [*Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958), *rem'd sub nom*, *West Georgia Broadcasting Co*., 27 F.C.C. 161, 18 R.R. 835 (1959)], the Commission has now adopted--with some exceptions--a policy of letting new technologies have their day in the market. Unlike pay TV which was so long

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46. *Memorandum Opinion and Certificate in File No. W-P-C-884*, 62 F.C.C. 2d 153 (1976). The retransmission of broadcast signals by resale common carriers has been held exempt from copyright liability. *See Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

> delayed, direct broadcast satellite, low power TV, multi-channel multipoint distribution systems (MMDS), and other new technologies have all been authorized (albeit with inordinate delays in handling the flood of applications in services like low power or MMDS). Furthermore, Congress has ratified this "letting in" approach.47/

While not intended to be exhaustive, the following overview of certain of the more promising systems may further a consideration of the copyright protection of works embodied in programming transmitted by these emerging subscription services. Discussion of these issues is particularly opportune in light of the proposed introduction of satellite direct-to-home subscription services in the coming months. Unlike satellite resale common carrier or direct-to-home satellite services, the transmission systems discussed below use primarily terrestrial microwave links or cables to distribute video programming to their subscribers. The programming transmitted may, however, be received directly or indirectly from a space satellite.

A. Subscription television transmission systems (STV).

The FCC initially approached the authorization of subscription television services with considerable caution. There was concern that the proposed service might siphon audience away from free over-the-air television to the detriment of the viewing public. After more than a decade of study, the first trial operation commenced in the summer of 1962 in Hartford, Connecticut. Six years later, the FCC concluded that

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47. H. Geller, Communications Law--A Half Century Later, 37 Fed. Comm. L.J. 73, 78 (1985).

subscription television, or STV, would provide a beneficial supplement to free television; however, it adopted very restrictive rules for this new service to assure the continued viability of conventional broadcasting.[48] Recognizing that feature films and sports programming would likely predominate in this new medium, the FCC limited the number of hours that could be devoted to films and sports in an attempt to stimulate the production of more diversified STV programming of a cultural or educational nature, and prohibited commercial advertising.[49] It also provided that only one subscription television operation would be permitted in any qualified community and that an authorization would be issued only where the principal community of a station was located entirely within the grade A signal contours of five or more commercial television broadcast stations, including the station of the STV operator.[50] The FCC also required an STV operator to broadcast at least 28 hours of conventional broadcast programming per week and prohibited the sale of decoders to subscribers.

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[48] *Fourth Report and Order in Doc. No. 11279*, 15 F.C.C. 2d 466 (1968), *aff'd*, *National Ass'n. of Theatre Owners v. F.C.C.*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

[49] When similar rules on pay TV in cable were struck down by the court in *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), these STV restrictions were subsequently dropped. *See* H. Geller, *supra* note 47.

[50] 15 F.C.C. 2d, at 595.

STV operations remained subject to these onerous FCC restrictions until 1977, when the FCC commenced a reevaluation of its rules on subscription television. In the proceeding, it was observed that, although non-experimental STV stations were permitted as of 1968, none commenced operation until almost a decade later.51/ The FCC recognized that the growth of STV had been encumbered by administrative restrictions and concluded that "STV should be given the opportunity to develop on an equal footing with conventional television since it can respond directly to the intensity of consumer preferences, and therefore serve the public interest."52/ It found that conventional broadcasting did not need to be protected from STV incursion, and reaffirmed its 1968 conclusion that nationwide STV service was in the public interest. With respect to pay services generally, the FCC noted that: "STV can no longer be considered a service offering a product of uncertain appeal. Pay programming is now widely available over cable, through MDS systems, as well as STV stations. Proposals to offer vast subscription services via a DBS service have been filed with the Commission. There is clearly a market for pay video services and suppliers are likely to find themselves competing not only with conventional television but also among themselves."53/

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51. Subscription TV Service, Third Report and Order in Doc. No. 21502, 90 F.C.C. 2d 341, 342 (1982).

52. Id. at 345.

53. Id. at 347.

The FCC continued to review its regulations on STV in an effort to deregulate this service and relieve STV operators of cumbersome requirements.54/ In this new regulatory climate, by 1982, subscription television operations had grown to between 1.5 million and 1.6 million subscribers, and the number of STV stations on the air reached 31 stations in 22 markets.55/ Those deciding to enter this business, or expand existing operations, now have about 133 television markets to consider. While the outlook for STV looks promising, there are some industry analysts who view subscription television as an interim technology. It has been observed that "[s]ubscription television was conceived as a way to provide viewers with extra programming until cable, microwave transmission, and other new technologies were available. 'It was always seen as a transition service, to serve during the window of time while the nation was getting cable.'"56/ Others believe that, if an STV operation achieves a high level of subscribership in an area before the arrival of cable, and STV subscribers are generally

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54. See, e.g., Subscription Television Service, Memorandum Opinion and Order in Doc. No. 21502, 53 R.R.2d (P&F) 646 (1983); see also Subscription Television Service, Fourth Report and Order in Doc. No. 21502 (Proceeding Terminated), 54 R.R.2d (P&F) 1275 (1983).

55. Subscription Television, Broadcasting, at 33 (Aug. 16, 1982).

56. N. Henderson, Channel 50 to Drop Super TV, Wash. Post, Oct. 28, 1985 (Washington Business), at 3.

satisfied with the quality of films, sports and special programming provided, they are not likely to change the mode of delivery of these mass-appeal pay services.57/

Today, subscription television services may be provided, in accordance with §73.642(a) of the current FCC regulations, by licensees and permittees of both commercial TV broadcast stations and low power TV stations.58/ With respect to low power stations, the FCC has observed that:

> STV may be particularly suited to formated programming on low power stations; indeed, in some markets it may be essential to the viability of the service. We believe that STV and low power share the potential to accelerate utilization of unused channels, provide viable financial support for specialized programming and small market stations and respond to the interests of the audience. We are not requiring a separate STV authorization, although proposed subscription operation must be indicated on the application form, and existing low power licensees that are providing free service wishing to change to subscription service must so notify the Commission via an application for minor modification.59/

One of the few remaining restrictions placed by the FCC on STV operations is that stations may conduct such operations "only by using an encoding system that has been approved in advance

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57. Subscription Television, Broadcasting, at 39 (Aug. 16, 1982).

58. 47 C.F.R. §73.642(a) (1984).

59. Low Power Television Service, Report and Order in BC Doc. No. 78-253 (Proceeding Terminated), 51 R.R.2d (P&F) 476, 520 (1982).

by the FCC."60/ Certain technical requirements must also be met.

While the FCC initially found subscription television to be a "broadcasting" service in its 1968 proceeding, court decisions applying former §605 [now §705(a)] of 47 U.S.C. to STV programming have held that the transmissions were not a form of broadcasting intended for the use of the general public. In National Subscription Television v. S&H TV, the court reasoned that, even though the subscription television operator hoped its programming would attract the widest possible audience, and designed its method of transmission to enable it to accommodate the anticipated demand, it was only in that sense "intended" to be received by the general public, that is, broadcast within the meaning of section 153(o), 47 U.S.C.61/ The courts have generally protected subscription services under §605 from the unauthorized manufacture, sale or distribution of STV signal decoding equipment.

Whether subscription services should be classified as "broadcast" was recently the subject of an FCC rulemaking. On October 4, 1985, the FCC announced its proposed decision to reclassify STV and DBS as point-to-multipoint (non-broadcast) services, which would exempt them from statutory and other regulations applicable to broadcast stations. While the text of the proposed rulemaking has not been issued, the FCC noted

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60. 47 C.F.R. §73.644(a) (1984).

61. National Subscription Television v. S&H TV, 644 F.2d 820 (9th Cir. 1981); see also Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980).

in a press release that, "because subscription transmissions are communications intended for specific reception points--the licensee's subscribers--they exhibit characteristics of point-to-point services rather than broadcasting. Thus, the direct contractual relationship between the licensee and recipients of subscription programming satisfied the test of 'addressibility' inherent in all point-to-point services and, therefore it should be characterized as such."62/

B. Multipoint Distribution Services (MDS).

While subscription television services (STV) are offered by licensees and permittees of commercial broadcast stations over broadcast frequencies, multipoint distribution services (MDS) are classified as "common carriers" and authorized to provide a non-broadcast omnidirectional service.

The FCC first allocated spectrum for this new service in 1962;63/ however, little use was made of the allocated band (2150-2160 MHz) for about ten years. A technical limitation was removed in 1970 that led to the filing of several applications proposing to use this spectrum for the common carrier distribution of television programming from a central location to numerous points selected by a carrier's subscribers. The applicants perceived a need "to provide for relay of

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62. NEWS (Federal Communications Commission), Oct. 4, 1985, at 2.

63. Report and Order in Doc. No. 14712, 39 F.C.C. 834 (1962).

instructional and training television to schools, industry, municipal government and for other miscellaneous uses such as the coverage of business, industry or medical conventions."64/

In reviewing the proposed future development of this service, the FCC noted the potential use of these facilities for the distribution of closed circuit entertainment programming to mass audiences.65/ In January 1974, the FCC adopted rules providing for two 6 MHz channels in 50 of the largest metropolitan areas: Channel 1 (2150-2156 MHz) and Channel 2 (2156-2162 MHz). In all other areas of the country, the second channel was designated Channel 2A and the bandwidth was limited to 4 MHz--6 MHz being required for transmission of a standard television signal.66/

In its report on the reallocation of channels from the Instructional Television Fixed Service (ITFS) to MDS, the FCC noted that, according to statistics compiled by a private concern, as of August 3, 1982, there were 82 MDS services operating and an additional 120 services licensed that had not yet obtained a customer.67/ With respect to programming carried by MDS services, it was stated that "[t]he majority of

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64. Multipoint Distribution Service, Notice of Proposed Rulemaking in Doc. No. 19493, 34 F.C.C.2d 719 (1972). For FCC rules on purpose and permissible MDS service, see 47 C.F.R. §21.903 (1984).

65. Id. at 722.

66. See Instructional Television Fixed Service (MDS Reallocation), 54 R.R.2d (P&F) 107, 110 (1983).

67. Id. at 115 (data collected by Paul Kagan Associates, Inc.).

the transmission time now leased by MDS common carrier licensees is used by their customers to transmit premium television to hotels, motels, apartment complexes and single family residences."68/ In light of the information submitted, the FCC concluded that there would be little growth in the use of MDS channels as long as there were only two channels available and each licensee was only allowed to use one channel per metropolitan area.69/ Acknowledging that there was a substantial public demand for additional premium entertainment programming, the FCC viewed multichannel MDS as a means of satisfying consumer needs, particularly in uncabled areas. As for the introduction of other multichannel alternatives to cable, the FCC observed:

> STV is a one channel service. A high power Direct Broadcast Satellite service, transmitting entertainment programming directly to individual homes on a widespread basis, is several years away. Low power television as a means for delivering subscription television is basically a low power version of STV. In any case, multichannel MDS will expand consumer options, and expanding consumer options is a legitimate public interest justification for reallocating spectrum.70/

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68. Id. at 110. Premium television was considered television entertainment programming for which the viewer pays a fee and that is not supported by advertising revenues. See id. at 110 n. 3.

69. Id. at 121.

70. Id. at 123. The FCC also observed that "[a] number of entities (e.g. United Satellite Communications, Inc.) have announced plans to attempt to use low power fixed satellites to deliver video entertainment programming to individual homes, in addition to traditional fixed satellite reception points (cable television systems, MDS systems, hotels, etc.)." It also noted certain difficulties faced by this new service. Id. at 123 n.20.

To encourage the development of multichannel MDS, the FCC decided to reallocate two groups of four channels each from ITFS use for multichannel multipoint distribution services (MMDS). In authorizing this reallocation, the FCC recognized that it was possible that "the same entity could lease all of the capacity of each common carrier, thereby precluding others from becoming MDS programmers."[71] The FCC considered requiring multichannel MDS licensees to so tariff their service that the public would not be forced to deal with only a single MMDS provider; however, it decided not to adopt such a requirement for the following reasons:

> First, we believe that the fact that an entity desiring to lease all available MDS channels will be required to deal with two common carriers somewhat reduces the possibility this will occur [the FCC decided to authorize only 4 channels to one licensee]. Furthermore, since we are also by this order allowing ITFS licensees to lease excess capacity in their facilities, it is possible that an entity that wishes to provide premium television service to the public could do so using such excess capacity. It is also possible that in many areas, the public will be offered a choice between multichannel MDS and cable. Finally, we believe that restricting MDS tariffs would prevent market forces from determining the optimum mix of channels.[72]

The FCC also determined that no new ITFS applications for the eight channels reallocated to MMDS could be filed, and permitted ITFS licensees to lease excess channel capacity.[73] As of

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[71] *Id.* at 135.

[72] *Id.*

[73] The lease of ITFS frequencies to MMDS programmers has recently been challenged in a case involving Wisconsin Bell. *See* *Wis. Bell MMDS plan under fire*, *CableVision*, at

September 9, 1983, about 16,500 MMDS applications had been filed with the FCC.74/

The classification of MDS as a non-broadcast common carrier service was recently questioned by the Court of Appeals for the D.C. Circuit in National Ass'n. of Broadcasters v. F.C.C. Rejecting the rationale relied upon by the FCC to exempt customer-programmers of DBS common carriers from regulatory constraints imposed on broadcasters, the court found that the FCC analogy to its treatment of MDS was misplaced. It noted that, at the time of the DBS Order, "the information that MDS would transmit was thought to be subscriber supplied; the FCC did not contemplate that MDS would be used to offer subscription television for reception by the general public.... Moreover, while the FCC more recently has come to allow MDS to be used for subscription television ... no court has yet passed on the validity of the Commission exemption of MDS programmer-customers from broadcast regulation."75/

Regardless of how MDS is classified for FCC purposes, the courts have consistently applied §605 [now §705(a)] of title 47 U.S.C. to the interception and use of MDS signals.76/

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11 (June 17, 1985).

74. See Second Report & Order in Doc. No. 80-112, 57 R.R.2d (P&F) 944 (1985).

75. National Ass'n. of Broadcasters v. F.C.C., 740 F.2d 1190, 1204 (D.C. Cir. 1984).

76. A court has held that the Copyright Act of 1976, title 17 U.S.C., does not preempt a claim arising under 47 U.S.C. §605, "even one sounding in copyright." See California Satellite Systems, Inc. v. Ralph Nichols, 1985 CCH Copyright Law Decisions ¶19,774 (Cal. 3d Dist. Ct. App. 1985).

For example, in the case of *Movie Systems, Inc. v. Heller*, the court found that, "[a]lthough the content of HBO programing 'may be of interest to the general public, access to that programing cannot be gained with traditional television sets.' ... The MDS microwave signal operates at such a high frequency that the signal cannot be received without the use of special equipment such as the microwave antenna and the down converter. We hold that the MDS transmissions are not broadcasting for the use of the general public and thus section 605 prohibits unauthorized interception of the MDS signal."77/

Preemption by the FCC over state regulation of MDS has also been an issue of concern to owners of MDS systems. In the early years of MDS, the FCC recognized that a substantial portion of programming offered by this service would include closed circuit video and other communications between the states. Thus, the FCC decided to retain full control over the selection of MDS licensees and declined to require an applicant to obtain state authorization where interstate service was initially anticipated.78/

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77. *Movie Systems, Inc. v. Heller*, 710 F.2d 492, 495 (8th Cir. 1983); *but see Orth-O-Vision, Inc. v. Home Box Office*, 474 F.Supp. 672 (S.D.N.Y. 1979). It has been reported that the U.S. 9th Circuit Court of Appeals has held the unauthorized interception of unscrambled MDS signals illegal under the Cable Communications Policy Act of 1984. *See Calif. high court modifies ruling in MDS case*, *Cable-Vision*, at 26 (Sept. 30, 1985).

78. *See Midwest Corp.*, 38 F.C.C.2d 897, 900 (1973).

In recent litigation, the Court of Appeals for the Second Circuit was asked to review a preemption order issued by the FCC precluding the New York State Commission on Cable Television "from regulating or prohibiting the reception of 'pay' or 'subscription' television programming transmitted to Orth-O-Vision's customers by a common carrier radio station in the Multipoint Distribution Service (MDS) to the master antenna television systems (MATVs) of apartment houses, hotels, condominiums, and the like, to which Orth-O-Vision's customers are connected."79/ In reaching its decision, the FCC noted the integral connection between MATV systems and receipt of programming transmitted via MDS and found that "the object of the State Commission's action was to permit municipalities, by denial of franchises, to terminate MDS programming transmitted to multi-unit dwellings, and thereby curtail MDS as a competitor of conventional cable television systems."80/ The court concluded that the FCC acted reasonably in determining that N.Y. State's regulation of MATV systems had a deleterious effect on MDS development by depriving this service of reception points, and denied the State's petition for review.81/

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79. *Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon. denied*, 82 F.C.C.2d 178 (1980), *aff'd sub nom*, *N.Y. State Com'n on Cable T.V. v. F.C.C.*, 669 F.2d 58 (2d Cir. 1982).

80. 669 F.2d, at 63; *but see* *Orth-O-Vision, Inc.*, 69 F.C.C.2d 657, 665 (1978).

81. 69 F.2d, at 64. The MDS station in the Orth-O-Vision case was part of a national network of Microband owned and operated MDS stations in ten states interconnected via a domestic communications satellite. *Id.*

C. Satellite master antenna television (SMATV).

A number of factors converged toward the close of the 1970's to stimulate the introduction of satellite master antenna television operations, particularly in areas not reached by franchised cable systems. Apart from the rapid development of satellite-delivered programming, a change in the FCC regulations on domestic receive-only earth stations (TVROs) made this form of "private cable" an attractive investment. In 1979, the FCC determined that "the public interest will be served by immediate implementation of voluntary licensing for receive-only earth stations."82/ This deregulation of TVROs took place about the same time that the size and cost of antennas dropped considerably. As noted in a recent report on the SMATV industry, these elements combined to make it "practical and economically feasible to provide satellite-fed programming to small, self-contained markets."83/ Several operations were immediately commenced.

In recent years, SMATV systems have grown up in many cities in the U.S. and Canada; and it has been estimated that the number of basic SMATV subscribers is currently 290,000 in over 498 U.S. cities.84/ While it is not profitable at this time to establish a SMATV system in building complexes of fewer

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82. Reregulation of Receive-Only Domestic Earth Stations, First Report and Order in CC Doc. No. 78-374, 74 F.C.C.2d 205 (1979).

83. H. Howard and S. Carroll, SMATV: A Changing Environment for Private Cable, 3 COM/TECH Report (July 1984).

84. Id. at 6.

than 300 units, where a single TVRO antenna is linked by CARS-band (cable television relay service) microwave transmissions to a number of small apartment complexes in a given area, the SMATV investment becomes more interesting.85/ Eventually, when the next generation of high-powered Ku-Band satellites are operational, the lowered cost of the receiving antennas may encourage further investment in the SMATV industry. As the number of SMATV systems increases, consolidation of ownership among the various distribution systems is anticipated. It has been noted that there is "[i]ncreasing evidence of joint ventures and business alliances between SMATV interests and multichannel multipoint distribution systems (MMDS), low power television (LPTV), subscription TV (STV), direct broadcast satellite systems (DBS) and other pay TV interests."86/

Like franchised cable systems, SMATVs draw programming from a variety of sources. SMATV systems use TVROs to receive transmissions via satellite, and a master antenna for receipt of over-the-air television signals. The programming is then combined and distributed by cable to subscribers, primarily in apartment houses and other multi-unit residential buildings. In addition to satellite cable programming such as HBO, ESPN and WGN, SMATV systems may choose to retransmit local broadcast stations, MMDS transmissions, local cable originations and STV services. While some programmers were initially reluctant to provide programming to SMATV, the difficulties

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85. Id. at 2.

86. Id.

have been resolved for the most part. Antitrust litigation in Arizona and Chicago appears to have settled or at least deterred conflicts over access to programming by SMATV systems.87/

From a copyright perspective, the retransmission of most subscription services by SMATV systems does not pose unique problems; however, the status of these systems for purposes of the compulsory licensing provision in §111 of title 17 U.S.C. is not clear. The recent classification of certain SMATVs as cable systems by the FCC may have some impact on whether a particular SMATV system should be considered a cable system under the copyright law.88/ The FCC decided to follow generally the definition of cable system adopted by Congress in the Cable Communications Policy Act of 1984. Where SMATV facilities serve subscribers in multiple unit dwellings, and such facilities use public rights-of-way, the FCC now considers them cable systems.89/

Competition between SMATV and franchised cable systems is keen. For many years, this was not the case. Franchised cable systems initially assigned a low priority to the wiring of apartment houses and other multi-unit residential

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87. Id. at 7; see also SMATV: The medium that's making cable nervous, Broadcasting, at 42 (June 21, 1982).

88. A question may also be raised concerning the application of the copyright compulsory licensing system in 17 U.S.C. §111 to other distribution services such as MMDS.

89. Implementation of the Provisions of the Cable Communications Policy Act of 1984, Final rule, 50 Fed. Reg. 18637, 18641 (1985).

dwellings. The rapid turn-over rate and the risk of piracy discouraged cable systems from investing in such complexes. Often building on existing master antenna television systems, SMATV operators entered into contracts with property owners to provide subscription services to individual units, primarily in uncabled areas.

Survival of SMATV after the arrival of franchised cable operations is thought by some to hinge, not just on the reputation of the SMATV operator for dependable, quality service, but also, where possible, on long-term exclusive contracts for the use of the distribution systems in multi-unit buildings.90/ SMATV operators view contract clauses preventing a franchised cable operator from "over-building," *i.e.*, duplicating the existing master antenna system, as critical to the continued viability of this service. Without these provisions, SMATV operators believe they would be put out of business by franchised cable systems, "not necessarily because the cable operator would be offering superior service, but because the market of each SMATV system is limited (comprising only the units in the building or complex being served) and competition of any kind could quickly reduce subscribership to a point where the SMATV system would be uneconomical. And then there is always the danger of cross-subsidization by the cable companies."91/

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90. *SMATV: The medium that's making cable nervous*, *Broadcasting*, at 34 (June 21, 1982).

91. *Id*.

To counter the attempts by SMATV operators to prevent or at least delay entry by franchised cable systems in multi-unit residential complexes, certain state and local governments passed laws to guarantee access by cable systems to these complexes without having to compensate the owner. Whether such provisions constitute a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the U.S. Constitution was challenged in a case brought under a New York statute. Section 828 of a 1983 N.Y. law, provided generally that a landlord could not "interfere with the installation of cable television facilities upon his property or premises," and may not "demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the Commission [State Commission on Cable Television] shall, by regulation determine to be reasonable."92/ The State Commission determined that a one-time $1 payment was the normal fee to which a landlord was entitled.93/

The Supreme Court found that Teleprompter's cable installation on the property owner's building was a taking without regard to the public interests that it was intended to serve. Affirming the traditional rule that "a permanent physical occupation of property is a taking," the court held that,

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92. New York Exec. Law §828 (McKinney Supp. 1981-1982), cited in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423 n. 3 (1982).

93. 458 U.S., at 424.

in such a case, "the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation."[94] The court did not question, however, a State's power to impose restrictions on the use of private property.[95] Without determining whether the fee that had been obtained by certain landlords from Teleprompter prior to the 1973 law's enactment was appropriate, the court remanded the case to the state courts on the issue of just compensation.[96] The mandatory access for cable franchises to multi-unit complexes apparently remains in force.[97]

While SMATV systems have taken steps to protect their interests from competition by franchised cable systems, cable systems have also sought protection from SMATVs. Where SMATVs are not deemed cable systems under the new definition of such systems in the Cable Communications Policy Act of 1984, they are generally not subject to state or local franchising requirements. This disparate regulatory treatment of SMATV and franchised cable systems by state and local governments has led to friction between these competing delivery systems. The issues were sorted out by the FCC in a recent proceeding in the

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94. 458 U.S., at 441.

95. Id.

96. Id.

97. See N.Y. State Com'n on Cable Television v. F.C.C., 749 F.2d 804, 814 (D.C. Cir. 1984).

matter of Earth Satellite Communications, Inc.98/ The FCC was asked to preclude the State of New Jersey from exercising jurisdiction under its Cable Television Act over SMATV systems. Excluded from consideration were SMATVs that were considered cable systems under the definition of cable television system in the FCC regulations then in effect.

The cable system representatives argued generally that the states had a legitimate interest in regulating a cable television system beyond the occupancy of the public streets and the rights-of-way, and that this interest should also extend to SMATV. They asserted that matters such as "basic rates, franchise selection standards, franchise duration, subscriber complaints, and construction supervision should apply to SMATV as well as to franchised cable television systems."99/ It was claimed that SMATV operators would negotiate for exclusive contracts with landlords and, thus, freeze out franchised cable operations. Without local regulation, SMATV operators would be free to charge arbitrarily high prices for their services; and residents of dwellings served by SMATV would have no way to insure "reasonable rates for basic service, resolve service complaints and determine the qualifications of the systems operators."100/

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98. Earth Satellite Communications, Inc., Memorandum Opinion, Declaratory Ruling and Order in Doc. No. CSR-2347, 55 R.R.2d (P&F) 1427 (1983), aff'd, N.Y. State Com'n on Cable Television v. F.C.C., 749 F.2d 804 (D.C. Cir. 1984).

99. 55 R.R.2d, at 1429.

100. Id. at 1430.

The FCC concluded that "state or local government entry regulation of SMATV will 'chill development' of this service or impede its growth."101/ In reaching its decision, the FCC looked for support to its prior decision preempting state and local rate regulation of pay television service itself, the primary programming source of SMATV systems. The FCC viewed the state regulatory process involving certification or registration and related procedures "as an obstacle to the accomplishment and execution of the full purposes and objectives of the Commission."102/ Such restrictions could impede the unfettered development of interstate transmission of satellite signals.

In reviewing the FCC order preempting SMATV systems, the Court of Appeals for the D.C. Circuit considered the prior FCC treatment of MDS systems in the Orth-O-Vision case discussed above in connection with MDS services. Recalling that the FCC had held the "state objective--to protect franchised cable from competition by regulating MDS--was 'an impermissible interference with interstate communications,'" the court found that "the only difference between MDS and SMATV is that SMATV bounces its signal off domestic satellites."

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101. Id. at 1433.

102. Id. at 1434.

Since no theory was advanced why this "relatively minor difference should compel the Commission to treat SMATV differently than MDS,"103/ the court upheld the FCC's decision.

D. **Teletext services.**

Experiments have been under way for the last few years on the use of broadcast spectrum, telephone wires or cables for the transmission of text and graphics to consumers. In the United States, by 1982, about twenty-three stations had been authorized by the FCC to carry out tests of this new technology.104/ Time Inc. has been one of these pioneers. Time began distributing its teletext service via cable systems in San Diego, California and Clearwater, Florida in October 1983. Their teletext service consists of between 4,000 and 5,000 pages of information and entertainment "including national and local news, weather, sports, business information, travel tips, stock quotes, learning games, arts and entertainment."105/ Other companies such as Reader's Digest's The Source have been providing access to a variety of information data bases, as well as electronic mail and other services.106/ Many additional teleservices have been offered

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103. 749 F.2d, at 810.

104. Teletext and Videotext: Jockeying for position in the Information age Broadcasting, at 38 (The Experimenters) (June 28, 1982); see also D. Stoller, Setting the videotext stage, CableVision Plus, at 6 (Dec. 6, 1982).

105. J. Grillo and S. Applebaum, Cable's video game field isn't a one-player game anymore, CableVision Plus, at 14 (Jan. 10, 1983).

106. Broadcasting, supra note 104, at 49.

both on an advertiser supported or subscription basis. It is thought possible to provide a wide selection of services "from home banking and shopping to exact line-by-line replications of daily newspaper stories" through these new distribution services.107/

Teletext differs from videotext in that teletext is generally considered a one-way transmission service of text and graphics. Videotext consists of the two-way transmission of such information and entertainment. Further, videotext is primarily transmitted by telephone or cable, while teletext is usually carried in the vertical blanking interval (VBI) of a full or low power television broadcast station. Where teletext is transmitted in the VBI of a broadcast station, it comes within the jurisdiction of the FCC; videotext is largely unregulated by the FCC. While there is some speculation about the survival of broadcast teletext when full channel cable-distributed videotext is widely available, there is a growing consensus that there are many different markets for a variety of teleservices waiting to be tapped.

The FCC initiated a proceeding in 1981 to review the possible authorization of teletext service on the VBI of television broadcast signals. The FCC listed as examples of teletext service covered by the rulemaking: "news, weather reports, comparative shopping prices, entertainment schedules, closed caption for the hearing impaired, and business oriented

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107. CableVision Plus, supra note 104, at 8.

information."108/ After examining the comments submitted, the FCC decided to adopt rules authorizing full and low power broadcast television stations: "(1) to operate teletext services and (2) to choose both the kinds of services to offer and the technical systems for transmitting the data signals."109/ Since teletext was generally considered a visual display medium, the FCC regulations defined teletext service as "a data system associated with a television broadcast signal that is used for the transmission of textual and graphic information intended for display on the screens of suitably equipped receivers and of data that is intended to enhance the use of teletext information."110/ The teletext definition does not permit the transmission of software, including material such as video games, computational routines and other data, "to allow the user to manipulate interactively images or data that are in an intermediate form not to be decoded directlyfor

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108. Teletext Transmission, Report and Order in BC Doc. No. 81-741 (Proceeding Terminated), 53 R.R.2d (P&F) 1309, 1311 n. 2 (1983).

109. 53 R.R.2d, at 1319.

110. 47 C.F.R. §73.646(a) (1984). The FCC determined that teletext service is of an ancillary nature and, as such, is "an elective, subsidiary activity." See 47 C.F.R. §73.646(c)(1984). The FCC has recently adopted new regulations on another auxiliary service, i.e., a service that is ancillary to the regular programming service of a broadcast station. The FCC authorized the transmission of non-broadcast services such as "paging, distribution of inventory, price and delivery information by businesses, bus dispatching for local and regional transportation and police communication to all substations," over FM subchannels. See FM Subsidiary Communications Authorizations, 53 R.R.2d (P&F) 1519, 1524 (1983).

viewing."111/ In authorizing teletext service without a standard technical system, the FCC wanted to avoid the lengthy delays that would ensue while a determination was made on a single system. The FCC was aware of the progress that was being made by telephone and cable systems in introducing teletext and videotext services, and did not wish to impede broadcasters from providing similar services, thus depriving the public of a wider variety of teletext services.112/

Copyright protection of teletext services has also come under scrutiny by the FCC. The National Association of Broadcasters observed that the decision of the Court of Appeals for the Seventh Circuit in WGN Continental Broadcasting Co. v. United Video required a case-by-case determination on whether teletext was separable from regular programming under the copyright law.113/ NAB thought that such determinations would be prohibitively costly.114/ It asked the FCC to require cable retransmission of all teletext signals of carried stations. There was opposition to this proposal. In refusing to impose mandatory carriage of teletext, the FCC concluded that:

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111. Teletext transmission, 53 R.R.2d, at 1320 n. 17.

112. 53 R.R.2d, at 1327 n. 31.

113. WGN Continental Broadcasting Co. v. United Video, 693 F.2d 622 (7th Cir. 1982), reh'g denied, 693 F.2d 628 (1982). The court held that "WGN's teletext is covered by the copyright on its nine o'clock news 'provided the teletext is intended to be seen by the same viewers as are watching the nine o'clock news, during the same interval of time in which that news is broadcast, and as an integral part of the news program.'" 693 F.2d, at 629.

114. Teletext transmission, 53 R.R.2d, at 1318.

> [T]he communications policy concerns underlying our mandatory carriage requirements are quite distinct from the considerations properly relied upon by the court in the WGN case to determine the scope of copyright protection for teletext services. NAB's suggestion, therefore, that cable television systems be required to carry teletext as a means of simplifying copyright determination is, in our view, neither appropriate nor required by the WGN decisions. Indeed, given both their ancillary and discretionary nature, teletext transmissions are plainly not analogous to the types of services that we have traditionally accorded mandatory carriage status.[115]

VI. CONCLUSION

When the Copyright Act of 1976 was enacted by Congress, the use of space satellites to transmit programming embodying copyrighted works was in its infancy. The growth of this distribution system has been remarkable. Satellite to cable system transmissions are the primary use being made of transponders on fixed satellites today, but direct-to-home satellite services are projected for early next year. When higher powered broadcasting satellites are introduced, the subscription services available through a domestic receive-only earth station should increase considerably.

In addition to the distribution services using satellites to deliver programming for direct or indirect home reception, several competing delivery systems have evolved over the last decade. The Federal Communications Commission now encourages this letting in of new services. Cable systems have received the most attention in the media, but other subscription services have emerged. Subscription television transmission systems (STV), multipoint distribution services (MDS), satellite master antenna television (SMATV) and teletext are a few of the new distribution systems being used to provide information and entertainment to the public. Joint ventures and business alliances between these competing systems are developing. The continued vitality of these various delivery methods is certainly beneficial to the consumer. The copyright law has an important role to play in promoting the creative efforts required to produce the variety of video and audio programming services these new systems can deliver to the viewing public.

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[115] 53 R.R.2d, at 1331.

The Cable Act was an important advance in communications law. It dealt with many subjects of immediate concern to the cable industry. Congress also included a specific provision on the receipt of satellite cable programming for private viewing. Generally, the Act requires a supplier of programming for transmission via satellite to cable systems to encrypt its programming or establish a marketing system in order to enjoy protection against the unauthorized interception or receipt by individual earth station owners. There has been some concern that program suppliers will impede access to satellite cable programming. Any legislative efforts to establish a mechanism to control or review rates set for program reception in this context raise important copyright concerns with respect to the protected works embodied in "satellite cable programming."

Mr. **Kastenmeier**. Well, the committee thanks you, Mr. Oman, and compliments you on your statement. I recommend not only your brief statement, but the lengthier one you have filed for the record, the latter is a 60-page statement and a comprehensive treatment of new technology and copyright issues. It deals with the two specific issues raised this morning, and a number of other related tangential issues, so that we can have, I think, a little broader vision of the interrelationship of a number of issues relating to technology and copyright.

Did you indicate what the view of your office is with respect to H.R. 3108, on low-power television signals?

Mr. **Oman**. Yes, sir. We support the concept and the actual draft of the legislation, and we urge that it be moved forward as quickly as possible.

Mr. **Kastenmeier**. Incidentally, I had asked for unanimous consent to include the letter of November 29, 1984, signed by Ms. Schrader, on that question, and I would also ask unanimous consent that the October 1, 1984, letter from myself and Senator Mathias to the Copyright Office also be included.

[The information follows:]

NINETY-EIGHTH CONGRESS

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U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515
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ASSOCIATE COUNSEL:
ALAN F. COFFEY, JR.

October 1, 1984

Honorable David Ladd
Register of Copyrights
Copyright Office
Washington, D.C. 20540

Dear Mr. Ladd:

We are writing to you in reference to provisions of section 111 of the Copyright Act and its potential effect on the carriage by cable systems of local signals of low power television. As you know, provisions of section 111 which define and distinguish "local" carriage and "distant" carriage were considered by Congress and the rules formulated prior to the introduction of low power service by the Federal Communications Commission. The distinction between "distant" and "local" is important because in most instances the royalty is computed on the basis of distant carriage.

It is our understanding that the Copyright Office may feel constrained by certain language in section 111 to classify the cable carriage of purely local low power television station signals as "distant" signals due to the fact that the Office might conclude that a signal must be subject to the FCC's must-carry rules before it could be considered local. This conclusion, of course, would result in carriage of these signals generating the same copyright liability as if they were "distant," thereby subjecting cable systems to the payment of significant royalties. Under such circumstances, we are informed that cable systems would be very reluctant to include low power stations within their complement of local services on a "may-carry" basis, which in turn would seriously damage the development and viability of low power television.

During the time that Congress was considering how section 111 should operate, all local television signals were subject to must-carry treatment and inclusion into the statute of a reference to FCC must-carry rules merely provided a convenient way to establish a clear dividing line between the "local" signals and the "distant" signals. The recent introduction of may-carry local low power signals was not contemplated at the time of passage of the Copyright Act of 1976, but Congress' intention was clear in wanting to distinguish between signals that were truly local and others that would be classified as distant. This was made manifest when, during consideration by the House of the Senate-passed bill, an amendment was added to mandate royalties for the carriage of signals when they were carried beyond the local coverage area of the station. Congress concluded that there would be no harm to copyright holders from such local carriage.

At a time in the near future, we intend to ensure that any ambiguity in the law is clarified by a technical amendment. Unfortunately, with a crowded legislative calendar and only a few days left in the 98th Congress, such an amendment is unlikely to occur this year. We believe, however, that an interim indication from the Copyright Office resolving any ambiguities in a manner to effectuate original intent can serve as a temporary solution to the problem.

Such an effort by the Copyright Office to resolve this problem will have our whole-hearted support. It will also be supported by Honorable Majority Leader Jim Wright and Senator Lloyd Bentsen, who have expressed personal interest in this issue.

Accordingly, we request you to consider the questions raised by this letter, and ask that you keep us apprised of your progress and any problems that might arise. If there is any way that we or our staffs can assist in this endeavor, please let us know.

In advance, thank you for your time and consideration.

Sincerely,

Bob Kastenmeier
ROBERT W. KASTENMEIER
Chairman,
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

Charles McC. Mathias, Jr.
CHARLES McC. MATHIAS, JR.
Chairman,
Subcommittee on Patents,
Copyrights and Trademarks

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November 29, 1984

The Honorable
Robert W. Kastenmeier
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Kastenmeier:

On October 1, 1984 you wrote to David Ladd, Register of Copyrights expressing certain views about the status of low power television (LPTV) signals under the cable compulsory license of 17 U.S.C. section 111. The Copyright Office held a public hearing on October 12, 1984 and received public comment through October 22, 1984. Your letter was made a part of the record of this proceeding.

The record discloses that owners of copyright, except for the National Association of Broadcasters, argued that under the Copyright Act definition of "local service area of a primary transmitter," the signal of an LPTV station must be classified as "distant" since the distinction between "local" and "distant" signals is frozen as of April 15, 1976 and LPTV stations have never been accorded "must-carry" status. Representatives of LPTV stations and cable system operators argued for a contrary interpretation of the Act. They argued that the Copyright Act's reference to the Federal Communications Commission's April 15, 1976 "must-carry" rules as the demarcation between "local" and "distant" signals was fundamentally based on geographic considerations, and the FCC's rules merely provided a convenient method of describing the geographic limits of local signals. Some members of the public advanced an alternative argument for classifying LPTV signals as "local." They asserted that LPTV stations should be viewed as "deregulated translator stations." Translator stations did exist on April 15, 1976 and were covered by the "must-carry" rules.

After reviewing the Copyright Act and its legislative history in connection with the divergent views expressed on the public record, including your letter of October 1, 1984, the Copyright Office has concluded that the status of low power television signals under the cable compulsory license is ambiguous. Accordingly, in examining cable Statements of Account, the Copyright Office will not question the determination by a cable system that a low power station's signal is "local" within an area approximating the normal coverage zone of such station.

A Notice of this policy decision was published in the Federal Register on November 28, 1984 at volume 49, pages 46829-31. A photocopy of the Notice is enclosed.

In your letter of October 1, 1984, you expressed the intention to clarify any ambiguity in the law by a technical amendment of the Copyright Act. The Copyright Office recommends such an amendment. We would be pleased to submit draft language, at your request.

Sincerely yours

Dorothy Schrader

Dorothy Schrader
General Counsel

Enclosure:
Notice of LPTV policy decision

information more readily accessible to the public.

DATES: Comments should be received on or before December 28, 1984.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail to: Library of Congress, Department D.S. Washington, D.C. 20540.

If delivered by hand, copies should be brought to: Office of General Counsel, James Madison Memorial Building, Room 407, First and Independence Avenue, SE., Washington, D.C.

EFFECTIVE DATE: November 28, 1984.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559, (202) 287-8380.

The Privacy Act Systems of Records of the Copyright Office are amended as follows:

1. In *Table of Contents*, add "CO-20—Secondary Transmissions by Cable Systems: Correspondence Files."

2. Add new system CO-20 as follows:

CO-20

SYSTEM NAME:

Secondary Transmission by Cable Systems: Correspondence Files.

SYSTEM LOCATION:

Licensing Division, Copyright Office, Library of Congress, Washington, D.C. 20557.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Cable systems owners and other individuals who correspond with the Licensing Division, the Copyright Office General Counsel or the Register of Copyrights concerning the administration of the cable compulsory licensing system in section 111 of title 17 U.S.C.

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

17 U.S.C. 111, 705.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Office maintains these records to facilitate public access to correspondence of the Licensing Division, Copyright Office General Counsel and the Register of Copyrights on the administration of the section 111 compulsory licensing system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Manila folders in a file cabinet and binders.

RETRIEVABILITY:

Correspondence usually accessible by date letter sent to member of public.

SAFEGUARDS:

These records are maintained in a room which is restricted to authorized personnel and locked during nonworking hours.

RETENTION AND DISPOSAL:

Records are retained indefinitely.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Licensing Division, Copyright Office, Library of Congress, Washington, D.C. 20557.

NOTIFICATION PROCEDURE:

Inquiries about an individual's record should be in writing addressed to the Supervisory Copyright Information Specialist, Information and Reference Division, Copyright Office, Library of Congress, Washington, D.C. 20559.

RECORD ACCESS PROCEDURES:

Requests from individuals should be in writing addressed to the official designated under 'Notification Procedure.'

CONTESTING RECORD PROCEDURES:

See rules published in 37 CFR Part 204.

RECORD SOURCE CATEGORIES:

Licensing Division personnel, the Copyright Office General Counsel and the Register of Copyrights.

Dated: November 19, 1984.

Dorothy Schrader,

Associate Register of Copyrights for Legal Affairs.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 84-31[illegible] Filed 11-27-84; 8:45 am]

BILLING CODE [illegible]

[Docket RM 84-4]

Cable Compulsory License; Policy Decision Concerning Status of Low Power Television Stations

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of policy decision.

EFFECTIVE DATE: November 28, 1984.

1. Background

Section 111(c) of the Copyright Act of 1976, title 17 of the United States Code, establishes a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. This compulsory license is subject to various conditions, including the requirements that cable systems file Statements of Account semi-annually and pay statutory royalty fees in accordance with section 111(d)(2) and as adjusted by the Copyright Royalty Tribunal in accordance with section 801(b)(2).

Six years after the enactment of Section 111, the Federal Communications Commission (FCC) authorized the establishment of low power television stations entitled to originate programming. *See* 47 FR 21468 (1982), *on recon.*, 48 FR 21478 (1983). Since 1982, 117 low power television stations have gone on the air and an additional 250 construction permits have been granted. Lotteries for new construction permits are held every month; the FCC is expected to grant up to 4,000 of these permits.

The status of these low power television stations under the Copyright Act's definition of the "local service area of a primary transmitter" has been questioned. This definition establishes the demarcation between so-called "local" and "distant" signals under the cable compulsory license. This demarcation is critically important since large cable systems, whose semiannual gross receipts exceed $214,000, compute their copyright royalties beyond the minimum fee [1] on the basis of distant signal carriage (*i.e.*, the "distant signal equivalent" formula is applied).

The definition of local service area is found in section 111(f):

> The "local service area of primary transmitter," in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976. . . .

The Copyright Act was enacted in 1976; the relevant section 111(f) definition refers to the type of television broadcast station that the FCC required cable systems to carry on *April 15, 1976.* Under one interpretation of the Act, since the low power television station category did not exist in 1976, they can not be considered "must-carry" stations under the FCC rules in effect on April 15, 1976. Moreover, the FCC currently does not require cable retransmission of low power television stations. The distinction between local and distant signals found in 17 U.S.C. 111(f) is frozen as of the FCC's rules in effect on April 15, 1976. The Committee on the Judiciary explained that they used this date in the relevant section 111(f) definition since they believed "that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 99 (1976).

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[1] All cable systems pay a minimum fee for the privilege of making secondary transmissions, irrespective of gross receipts or actual distant signal carriage. 17 U.S.C. 111(d)(B)(1), (C) and (D).

During the past year, representatives of cable systems have asked the Copyright Office whether these low power stations may be considered as "local" within the relevant definition of section 111(f). Reasoning from the language of the Act itself, the legislative history cited above, and the fact that the FCC did not choose to give these stations "must carry" status when they considered the matter, 48 FR 21475, 21482 (1983), the Copyright Office responded that low power television stations were not subject to the FCC's "must carry" rules and would presumably be classified as "distant" signals under the definition in 17 U.S.C. 111(f).

On Spetember 25, 1984, various representatives of the low power television community asked the Copyright Office to reconsider its position on the status of low power television stations under the section 111(f) definition of "local service area of primary transmitter."

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In response to the urgency of these requests, the Copyright Office held a public hearing on October 12, 1984, for the purpose of eliciting comment on the correct interpretation of the Copyright Act as it relates to the status of signals of low power television stations retransmitted by cable systems. Specifically the Copyright Office invited comment in two areas: (1) If a cable system retransmits a low power television signal, should the signal be characterized as "local" or "distant" for purposes of applying the distant signal equivalent value formula? If the response is that the signal should be considered "local," how are the limits of the station's "local service area" difined and by what authority? (2) If a cable system retransmits a low power television station on the basis of a voluntary license from the station and all owners of copyright in all copyrighted works transmitted by the low power television station have granted explicit voluntary licenses for the secondary transmission by cable, must the cable system nevertheless specify that carriage in its Statement of Account and pay copyright royalties under the compulsory license, (assuming the cable system retransmits at least one additional broadcast signal), or is the retransmission of such a low power television station outside the cable compulsory license since all copyright owners have consented voluntarily to the retransmission?

2. Summary of the Hearing and Comment Record

At the October 12, 1984, hearing representatives from the American Low Power Television Association (ALPTA), Low Power Television, Inc., Community Broadcasters of America, Inc., Community Antenna Television Association (CATA), ACTS Satellite Network, Inc., American Christian Television System, Inc., and seven operators of low power television stations testified. The comment period was held open until October 22, 1984, and twenty-two comments were received. In addition to the comments submitted by those who testified at the hearing, comments were submitted by the Motion Picture Association of Amercia (MPAA), Major League Baseball, the National Association of Broadcasters, Multivisions, Ltd., Bogner Broadcast Equipment, Times Mirror Cable Television, Inc., National Cable Television Association, and more individual operators of low power television stations.

a. Status of Low Power Stations. Everyone who testified at the October 12 hearing took the position that low power television stations should be considered local signals within section 111(f). Several different arguments were presented for reaching this conclusion. The ALPTA and other members of the low power community took the position that the interpretation given by the Copyright Office is not required by the statute and is inconsistent with congressional intent. In support of the ALPTA argument an October 1, 1984, letter to the Register of Copyrights from Representative Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, and Senator Charles McC. Mathias, Jr., Chairman of the Subcommittee on Patents, Copyrights and Trademarks, was introduced in which these Members of Congress expressed the view that when section 111 was enacted all local signals were subject to must carry status and may carry local low power signals were not contemplated, but "Congress' intention was clear in wanting to distinguish between signals that were truly local and others that would be classified as distant." In this letter these Members of Congress indicate that any ambiguity in the law will be clarified by an amendment but ask the Copyright Office for "an interim indication . . . resolving any ambiguities in a manner to effectuate original intent . . ."

CATA argued that low power television is not a new service but an evolution and modification of the long standing television translator rules. To support this position CATA asserted that most of the rules governing translators also apply to LPTV stations. The same application forms are used by both, and a translator can convert to LPTV status by simply filing a letter asking for the authority to originate programming.

CATA minimizes the 1982 FCC decision that denied "must carry" status to LPTV stations by arguing that it is a post 1976 rule change that has no effect on the relevant definition in copyright law and that it was made as a result of the deregulation climate at the FCC.

In accord with their position that a LPTV station is a "deregulated translator," CATA stated that LPTV local service must be defined in the same manner that the local service area of a television translator was defined under the FCC rules in 1976. A determination of local status depends on whether the translator serves the cable community: the license so specifies, the signal is actually available, or the translator provides a "quality signal" to the cable community.

Representatives of Community Broadcasting and individual LPTV station operators testified concerning the need to obtain local status in order to be carried by cable systems.

Although no opposition to the ALPTA position was given at the October 12 hearing, during the comment period, representatives of copyright proprietors submitted statements in support of the interpretation originally given by the Copyright Office. The MPAA argued that if the statutory definition of "local service area" is disregarded, there will be no way to determine when a low power station is "local" and when it is "distant."

Responding to CATA's translator argument, Major League Baseball asserted that some translator stations did not have "must carry" rights under the April 15, 1976, FCC rules and that Copyright Office should not consider LPTV stations as "deregulated translators" since the FCC had not adopted such a construction. Finally, they argued any decision that carriage of a LPTV signal receivable off-the-air within a thirty-five mile zone is royalty-free must be made by Congress.

Other commentators supported the ALPTA position. Times Mirror Cable Industry, Inc. agreed with ALPTA that a ruling that locally broadcast LPTV signals are "local" under § 111 could be based upon the statutory language. Times Mirror argued that a LPTV station is a broadcast station whose signal is subject to compulsory licensing under section 111(c) but that its signal is not the signal of a "television broadcast station" for the purpose of defining the "local service area" in section 111(f). Times Mirror reached this conclusion by maintaining that "television broadcast station" in section 111(f) is a term of art referring to full power television stations. Times Mirror also observed that section 111(f) provides an alternative for defining the local service area of broadcast stations which do not possess mandatory carriage rights, *e.g.*, radio stations; that the FCC "must carry" rules for translators do not specifically define the local service area; and that the local area served for LPTV could be determined in the same way. Alternatively, Times Mirror argued that LPTV could at least be treated as local broadcast stations when carried by cable systems in their community of license and any other community served from the same headend.

Multivisions, Ltd. took the position that the Copyright Office's interpretation ignored the "common sense" of the statute, was overly simplistic, and at odds with the probable congressional intent. To support this position Multivisions quoted from the Seventh Circuit Court of Appeals opinion that the courts should "interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than . . . narrowly and so force Congress periodically to update the act." *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 685 F.2d 218 (7th Cir. 1982), *rehearing denied* 693 F.2d 628. Multivisions asserted that the "mechanistic application of a 'distant' lable to all LPTV signal carriage would be at odds with the intent of the Copyright Act."

-The comments submitted by the National Association of Broadcasters (NAB) and individual cable operators supported the ALPTA argument that LPTV signals should be classified as "local" without elaborating on it. Both NAB and several of the operators did suggest that this "local" classification should apply only in an area approximating the normal coverage zone of such stations.

b. *Retransmission Consents.* As to the second issue, all of the witnesses and commentators agreed that retransmission licenses could be negotiated, and royalties therefrom would substitute for compulsory license royalties for the particular signal for which consent had been secured. The MPAA wrote that such consents are a "practical, marketplace solution." At the hearing, however, LPTV operators testified that acquiring all of the consents necessary was a long and arduous procedure.

3. Policy Decision—Status of Low Power Television Signals

Having reviewed the statute and the legislative history in connection with an examination of the divergent views presented at the October 12 hearing and during the comment period and having noted the Kastenmeier-Mathias letter, the Copyright Office has concluded that the status of low power television stations under the cable compulsory license of the Copyright Act is ambiguous. Consequently, the Copyright Office will take a neutral position on this specific issue, awaiting the legislative clarification mentioned in the letter from Senator Mathias and Representative Kastenmeier. In examining Statements of Account, therefore, the Copyright Office will not question the determination by a cable system that a low power station's signal is "local" within an area approximating the normal coverage zone of such station.

a. *Retransmission Consent.* On the second issue presented in the September 25 ALPTA letter, opposing interests presented uniform responses that cable systems may carry low power television stations pursuant to negotiated retransmission consents. There was no suggestion that this could not be done outside the compulsory licensing provisions of section 111. If copyright owners and cable systems uniformly agree that negotiated retransmission consents supersede the compulsory license requirements, the Copyright Office has no reason to question this interpretation provided that the negotiated license covers retransmission rights for all copyrighted works carried by a particular broadcasting station for the entire broadcast day for each day of the entire accounting period. Since it appears that the negotiated license would supersede the compulsory license under these circumstances, cable systems would not have to take account of the signal of the low power television station for which the copyright owners' consents have been obtained in paying copyright royalties.

(17 U.S.C. 111, 702)

Dated: November 19, 1984.

Dorothy Schrader,

Associate Register of Copyrights for Legal Affairs.

Approved by.

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 84-31166 Filed 11-27-84; 8:45 am]

BILLING CODE [illegible]

NATIONAL CAPITAL PLANNING COMMISSION

Senior Executive Service; Performance Review Board; Members

AGENCY: National Capital Planning Commission.

ACTION: Notice of members of Senior Executive Service Performance Review Board.

SUMMARY: Section 4314(c) of Title 5, U.S.C. (as amended by the Civil Service Reform Act of 1978) requires that each agency establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more Performance Review Boards (PRB) to review, evaluate and make a final recommendation on performance appraisals assigned to individual members of the agency's Senior Executive Service. The PRB established for the National Capital Planning Commission also makes recommendations to the agency head regarding SES Performance awards, ranks and bonuses. Section 4314(c)(4) requires that notice of appointment of Performance Review Board members be published in the Federal Register.

The following persons have been appointed to serve as members of the Performance Review Board for the National Capital Planning Commission: Reginald W. Griffith, Robert E. Gresham, Daniel H. Shear, Richard L. Petrocci and Armen Tashdinian.

DATE: November 28, 1984.

FOR FURTHER INFORMATION CONTACT: Malcolm L. Trevor, Special Assistant for Administration to the Executive Director, National Capital Planning Commission, 1325 G Street, N.W., Suite 1007, Washington, D.C. 20576, (202) 724-0206.

Mr. **Kastenmeier**. In your analysis of the legislation, are there any amendments necessary? Are there any other issues which might be considered that relate to low power in the context of the legislation as introduced?

Mr. **Oman**. I think the legislation as drafted stands nicely alone, and it probably would make consideration of it much easier if it remained unencumbered by tangential issues.

In terms of the actual draft, we do support the language as introduced.

Mr. **Kastenmeier**. In terms of the state of the marketplace, the state of the technology and its development, would you conclude that we ought to move expeditiously on this matter? Contemplating potential litigation, would it be desirable, do you think, for the Congress to move swiftly on this question?

Mr. **Oman**. Yes, Mr. Chairman, I think it is very important to clarify the law. There is the ambiguity in the law. We are, in fact, operating on the basis of the exchange of letters, and it would give us great comfort if, in fact, procedures that we have instituted would be supported by an actual law on the books.

Mr. **Kastenmeier**. I have several other questions, but I am going to yield to my colleagues for their questions first, and then I will return to some other questions.

I would like to yield to the gentleman from California, Mr. Moorhead.

Mr. **Moorhead**. Thank you, Mr. Chairman.

I want to join our chairman in welcoming you here this morning.

Mr. **Oman**. Thank you very much.

Mr. **Moorhead**. It is your first time before this committee. One of the most controversial issues that has come up in this area deals with the scrambling of programs by cable television to prevent them from being shown on the satellites.

It is an issue we are going to have to face in this committee. Cable feels that their product has been developed at their own expense, especially pay television, pay programs, and many other types of programming that have been supplied by cable as a special service to their subscribers.

The satellite people feel that they are a new industry, that they will be badly hurt if they cannot get these programs, and many of the systems would be willing to pay to have them.

Has your office taken any position whatsoever on this issue?

Mr. **Oman**. No, Mr. Moorhead, we are still in the process of studying the technologies and the alternatives and the various issues that are raised. We have raised many of those questions in our prepared statement.

I think we are sympathetic to the interests of the homeowner, the person with the dish in the backyard, to have access to programming, but it would be our preference to have the marketplace resolve this issue as it is best able to do.

There are certain problems of a technical nature that we may need some congressional assistance to work out, but I have every belief that they are now in the process of finding ways to provide the homeowners with the programming they need to give them the entertainment they seek.

Mr. **Moorhead**. Now, on another issue, if payments are not made to the Copyright Tribunal by low-power TV stations, has any study been made as to the loss of potential income that would be suffered by the broadcast stations or by the motion picture industry as a result of that decision?

Mr. **Oman**. On the low-power television issue, in fact, the broadcasters and the motion picture industry have not voiced objection, to my knowledge, and there is a general consensus that the proposed legislation is fair to all parties.

Mr. **Moorhead**. What percent of the viewers rely on this low-power television for their entertainment?

Mr. **Oman**. It is a very small portion of the audience now, but it is growing, and I understand there could conceivably be a great increase in the number of television stations. I understand there are now 4,000 applications pending to establish low-power television systems in the country.

Mr. **Moorhead**. Would this be more apt to be a problem later on down the line, then, as far as payments?

Mr. **Oman**. It could conceivably be a problem, though I don't foresee that happening. But it certainly does argue in favor of early passage of the bill so we can solve the nut of the problem in its infancy, rather than wait for it to grow into a major industry before acting.

Mr. **Moorhead**. I see.

Thank you.

Mr. **Kastenmeier**. The gentleman from Kentucky, Mr. Mazzoli.

Mr. **Mazzoli**. Thank you.

I am curious, getting to the issue of scrambled signals, is there anything that provides a precedent for us to suggest that if we let the marketplace set the prices, that the individual dish owner would be required to pay some station or some system or some copyright holder, that that homeowner would have the opportunity to have accessible a decoder for that particular scrambling system?

And maybe to extend that question, would the homeowner be likely to have four or five or six decoders stacked up on top of a television set in order to get HBO, Showtime, or whatever signals will be scrambled?

Mr. **Oman**. The technology, I think, has reached the point where only one decoder will be necessary, and I think the technology is being driven by the economics, and there is mutual interest in keeping the technologies simple and cheap for both the homeowner and the distributor.

In terms of the other half of the question, I would like to ask Ms. Schrader to respond.

Mr. **Mazzoli**. Thank you.

Ms. **Schrader**. We have been reading reports similar to those you have probably read that the cable industry has been attempting to develop a more or less uniform system of scrambling to simplify the problem for themselves and for the possible subscribers.

We understand that Home Box Office is adopting a particular system, the M/A-COM system, and that other distribution services apparently are going to use the same scrambling system. This would mean that one decoder, which apparently will initially be priced at about $395, would be available to the consumer. We further understand that the producer of the decoder has given assurances that as many as 100,000 decoders will be available in the near future at various retail outlets.

These are some of the proposals. Whether this will ultimately prove to be a reality or whether, indeed, there will be different scrambling systems, requiring a number of different decoders, of course, we can't predict.

Mr. **Mazzoli**. All of us had visits from our constituents last week or the week before when they had the big convention here in town, and I think some of my people are not—at least they tell me—really against or resistant to the idea of paying the copyright owner a price for the use of the material.

And in effect, they are not against paying HBO or any other system which decides to scramble a fee for the use of that scrambled signal. But what they do object to is the problem of having all of this technological swirl and chaos, which is one thing which I believe is a legitimate question.

I think their second concern is they brought up the specter of monopoly, where in fact, certain cable systems are being owned by certain program companies, which are being, in turn, owning the system which makes the decoder.

So they fear this combination which may cause a kind of a restraint of trade, within the industry, which would drive up the prices and which would limit the quantity and reduce the number of offerers of the service.

I wonder if there is any help that I could give to my constituents back home that this will not be the ultimate outcome of this effort, which I think is legitimate, which is to scramble the signal in order that a person can't just take down from space my property, and not pay for it.

Mr. **Oman**. I think two points should be made. No. 1, the antitrust laws are still available to attack those combinations that artificially restrain the access to the programming.

No. 2, look at the limited experience we have had thus far in terms of requests for voluntary compliance with the systems that are being set up. I think the prices that are being asked are entirely competitive with those that are being asked of people who are subscribing to the cable.

I think the range of cable fees are $10 to $20 a month, and the people who are providing signals from the satellite which are about to be scrambled are asking in the neighborhood of $10 or $12 per month for that service.

Mr. **Mazzoli**. I have one question in this area, and I have one final question. The question is, I was told by my constituents that they are alarmed, in some cases, that they have to pay a cable system the money that is destined for HBO or for the scrambler.

Are you aware of the procedure that is being set up which, in effect, puts the cable systems in some control of this, when, in fact, this procedure would involve the homeowner, the dish owner, and the scrambler? Are you aware of anything like that?

Mr. **Oman**. I am not aware of it. Ms. Schrader may be.

Ms. **Schrader**. We have heard that Home Box Office, at least, will make its programming available both through the local cable system or, alternatively, at the home dish owner's option, through an 800 nationwide telephone line, so that apparently——

Mr. **Mazzoli**. But you are not aware of where the money would be paid, or how that is to be handled?

Ms. **Schrader**. I believe that in the case of the 800 telephone line, there would be arrangements to pay Home Box Office directly.

Mr. **Mazzoli**. Directly?

Ms. **Schrader**. But of course——

Mr. **Mazzoli**. So you——

Ms. **Schrader**. But if you use the whole cable system——

Mr. **Mazzoli**. My other question is about the first bill before us relating to low-power television. I was just curious, when this draft was put together by the general counsel, was that at a time when it was felt that if you became a local signal, you would be entitled to be carried as a matter of law on the cable system?

Mr. **Oman**. No; I think the point is that it is the option of the cable company, if they have the capacity at their command for the programming, they would be free to carry the——

Mr. **Mazzoli**. No; I am saying that is, of course, the current situation. But at one time, they did not have the option, before the court——

Mr. **Oman**. In terms of must-carry?

Mr. **Mazzoli**. In terms of must-carry. And was the bill—What I am really driving at is the following: Was it the net effect or the intent of the original draft of the bill that being designated as a local signal, which is really what this bill drives at, would really also give LPTA a chance to be carried as a matter of right by the cable system?

Mr. **Oman**. Let me ask Ms. Schrader to respond.

Ms. **Schrader**. I think the answer is no, since the FCC had previously ruled, I believe in 1983, or perhaps 1982, that low-power television stations would not have must-carry rights. The amendment of the copyright law would not compel that result—it would just make LPTV signals local for copyright purposes and for purposes of computing the royalties.

Mr. **Mazzoli**. They would not be entitled by reason of that change of designation to some kind of carriage rights, is that correct?

Ms. **Schrader**. That would be my opinion, if the must-carry rules were are still in effect.

Mr. **Mazzoli**. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. I must say to my colleague, those are good questions. I think that question is one that should have been clarified. What is the relationship, in other words, of the must-carry decision to low power? That was the gentleman's question: Whether the bill takes that into account, whether the change effected by the must carry decision would affect the bill in terms of its impact or its relationship.

The answer is no, it is not affected, although, as I say, the question is a good one, an obvious one.

I yield to the gentleman from Virginia, a cosponsor of the bill.

Mr. **Boucher**. Thank you very much, Mr. Chairman.

Mr. Oman, I am pleased to hear that the Copyright Office is strongly in support of H.R. 3108. In terms of addressing the sense of urgency in having that legislation adopted, can you give us some sense of whether low-power television companies today are waiting for the passage of this bill before they begin operations?

Or are they relying upon the assurance extended by the Copyright Office last year that a determination by any local cable system that low-power television is indeed a local signal, will not be challenged by the Copyright Office, and starting operations right away?

Mr. **Oman**. To my knowledge, they are not hesitating in terms of construction or seeking their franchises on the hope that the legislation will pass. I think they are relying on the assurances given to them by the Copyright Office. I think they are on very firm legal ground, and it is not an disincentive to going into business.

Mr. **Boucher**. Of course, we have Mr. Hutcheson as one of our witnesses this morning from the industry, and I am sure he will want to comment on that as well.

Nevertheless, we appreciate very much your strong support for that legislation.

Let me turn briefly to the matter of Earth stations, and while the subcommittee does not have before it H.R. 1840, that has been referred, I believe, to the Committee on Energy and Commerce, it does raise some rather interesting questions that I think we should address this morning.

That legislation would place some broad new powers in the FCC. In particular, it would allow the FCC to set prices and terms and conditions for the receipt of signals broadcast by satellite and received by Earth stations.

In essence, it creates what could be called a compulsory license for the receipt of those signals by Earth station owners. And yet it seems to me somewhat unprecedented because this compulsory license falls outside the copyright law.

I wonder what your comment on that is? If we are going to have a compulsory license, along the lines of H.R. 1840, should that not be contained within the copyright law, rather than some other section of the code?

Mr. **Oman**. Accepting your premise that we do resort to the compulsory license which the Copyright Office has traditionally viewed as a last resort, I think in theory it would be better to have that administered within the structure of the copyright law, rather than the communications law.

I suspect the FCC would be very eager to agree with that position.

Mr. **Boucher**. Let me ask a somewhat broader question, and that is, should we have legislation which places within the copyright law the right to receive signals that are broadcast by satellite for receipt by Earth station owners?

Mr. **Oman**. Again, I reiterate the preference of the Copyright Office for reliance on the free market mechanism, and viewing the compulsory license as a last resort.

I think there are economic incentives on all sides to encourage access to these signals, and that if there is a workable mechanism whereby people can pay, and the price by the force of the market is fair, and there is not a great deal of difficulty in terms of complying with the law, then people will comply and that money will be made, and service will be provided.

Mr. BOUCHER. Thank you very much.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The issue just raised by the gentleman from Virginia derives from language in the bill, H.R. 1840, which states as follows:

Any person who received encrypted satellite cable programming may receive such programming decoded for private viewing upon compliance with prices, terms and conditions established in the marketplace or by the Commission which are not inconsistent with the policies and provisions of this title.

That is thought to be the equivalent of a compulsory license, the same mechanism, except in a different setting. And I appreciate your comment.

In comment, I would think that if, as a policy matter, Congress decided to grant a compulsory license, then it ought to be in the context of the copyright laws and not in an external regulation by the FCC.

You deal with a number of distribution systems for subscription services—one question is with respect to teletext. Is teletext, in your view, protected by copyright?

Mr. OMAN. Ms. Schrader is prepared to respond to that question.

Ms. SCHRADER. Of course, it would depend on the particular content of the transmission, but by and large, one might suppose that there would be some compilation of information—something that might be considered a data base—which then could be protected as other compilations and other data bases are.

My guess would be that by and large, they are subject to copyright protection, but there are questions about how the right of public display would be applied. There are problems especially about transmissions across borders, between the United States and Canada, for example—which law would apply, the United States or Canadian law, and of course, what would that law be?

Mr. KASTENMEIER. Thank you.

Going back to Earth stations, in your statement, you raise the question of copyright ramifications of satellite signal encryption. Among others, you ask, should the copyright law be amended to ensure public access to satellite-delivered copyright materials?

How could this be done, and what are your further thoughts about that issue?

Mr. OMAN. Ms. Schrader, do you want to start?

Mr. KASTENMEIER. Ms. Schrader.

Ms. SCHRADER. As Mr. Oman has already said, we are not really taking a position that this would be an appropriate solution. Subject to that qualification, it probably could be done in one of two ways. One method would be amendment of the definition of public performance, which I would suggest is perhaps a radical approach, especially if you try to sweep in private performances. Of course, by this method, you would then be able to create certain exemptions for those who have private performances of works, such as "backyard" satellite TVRO owners. It is a rather radical method, however, and would get you into all sorts of problems about private performances, such as somebody singing music at home and whatever.

Another method might be by indirection. Under the present law, the copyright owner does have protection with respect to reception in public places, so the same signal basically might be picked up by a bar or motel, by a satellite dish at home.

It might be possible to prepare a bill where you would take away from the copyright owner the protection that now exists with respect to public reception, that is, in public places, unless there is adequate access, and at reasonable terms, in the case of reception in private homes.

Mr. KASTENMEIER. With respect to Earth stations and the question of encryption—as a practical matter, this goes beyond perhaps the copyright competence—is there any method by which the owners of copyrighted works that are intended to be compensated can be protected other than by the use of encryption devices?

I ask this because encryption does seem to involve yet another technology and yet additional expenses in and of itself, and may pose other questions such as the gentleman from Kentucky raised, as to who owns and operates, and for what purpose, the encryption devices.

Is there any other means possible of assuring that the appropriate owners of copyrighted works are compensated, other than through encryption?

Mr. OMAN. There would be ways to do it. I am not sure that they would work very well in the real world. There were suggestions made at one point to license the dishes the way jukeboxes are licensed, with an annual maintenance fee.

The necessarily private nature of the home viewing community makes that more difficult than a jukebox, which is located in a public place and accessible to the public by its very nature.

That is one of the methods that was selected or suggested short of encryption. Ms. Schrader, do you have any others?

Ms. SCHRADER. No, I don't.

Mr. KASTENMEIER. If you went that direction, you would need something like the CRT to determine how to split up the pie again, just as we do for the compulsory license among, I suppose, so many proprietors.

It is assumed, I gather, that many programmers or sources or owners of programming, will not seek to encrypt their programs for various reasons, whether it is CNN or other such sources, because they have always sought the widest possible reception of their programming, notwithstanding that they are not compensated by the viewer thereof.

Is not that your——

Mr. OMAN. I think there will always be economic incentives to make programming available to these dish owners, whether or not they do have the decoders. They may not be able to pick up certain specialized programming, like HBO, but there will always be some programming available to them free of charge, unencrypted, because people do want to build their audience and rely on advertiser-supported programming.

Mr. **Kastenmeier**. Are there any other questions from the committee?

If not, the committee is very indebted to you and again, let me compliment you on your appearance here this morning. We, again, wish you the very best. We look forward to working with you on not only these, but many, many issues involving copyright.

It is always good to welcome back your colleagues as well who appear before us.

Mr. **Oman**. Thank you very much, Mr. Chairman. I guess the honeymoon is now officially over.

Mr. **Kastenmeier**. Our next witness is Mr. Richard Hutcheson, secretary and treasurer of the Community Broadcasters Association. Mr. Hutcheson served in the Carter White House as Mr. Carter's Staff Secretary from 1977 to 1981.

Leaving the administration, Mr. Hutcheson was a visiting fellow at Swarthmore College shortly thereafter. He formed the Local Power Television, Inc., in 1981, and has been working full time in the low-power television industry ever since.

Mr. Hutcheson, you are most welcome. You may proceed as you wish.

TESTIMONY OF RICHARD G. HUTCHESON III, SECRETARY-TREASURER, COMMUNITY BROADCASTERS ASSOCIATION

Mr. **Hutcheson**. Thank you, Mr. Chairman.

I appreciate very much the opportunity to speak here today, both in behalf of the Community Broadcasters Association, which represents the low-power industry, and also as a low-power broadcaster.

My company owns and operates three low-power stations, and has plans to build additional stations in coming years.

I would like to do two things today: First, to just talk generally about low-power television—what is it? And second, to talk specifically about the key difficulty our industry faces, having to do with the uncertainty as to the copyright status of low-power stations.

And let me say, Mr. Chairman, that our industry is very grateful to you and grateful to Congressman Boucher for your leadership role in both identifying this copyright issue and in sponsoring H.R. 3108 to help deal with it.

Let me now talk about the low-power industry generally. Low-power stations are functionally identical to any other TV station. They can operate on any channel between 2 and 69, and you don't need any particular wires or decoders to pick them up. It is just regular television.

You turn on the TV set, and you can watch the low-power station. The one difference is that we are limited to 1,000 watts of power. So our signals extend 20 to 35 miles on the average, whereas a conventional television station's signal will extend 50 to 70 miles.

But to the television viewer within the coverage area, the signal looks exactly the same.

This limitation on power is our principal advantage. Because we are smaller, low-power stations are also cheaper. And therefore, speaking generally, they require about one-sixth of the investment of a full-power station. A low-power station can cover about one-third of the territory, which we believe is a pretty good bang for the buck on investment.

Because of this financial incentive, there were an enormous number of applications filed for low-power stations in the 1980 to 1984 period, after the Commission announced the low-power service; 40,000 applications have been filed for low-power stations, and ultimately, 4,000 stations may be licensed and authorized.

There are two particular advantages that the low-power service has to offer to the communications universe. First, with 4,000 new stations, there exists an important new avenue for ownership of broadcast properties. It is possible now to significantly broaden and diversify the ownership of broadcast television stations in the United States.

Second, and most important, the low-power service makes possible free local broadcast TV stations in markets which heretofore have not had an opportunity to have local television service.

Rural areas and smaller cities, which in the past have had to rely on big city television stations received either with pole antennas or via cable systems, can now for the first time have their own local television station.

People in smaller markets are just as interested in local news and current events as are residents of large cities, and with the low-power service, they are able to have local television.

We believe that the fostering and preservation of local broadcast TV is a very important norm, and a very important service provided by our industry at a time when superstations and national networks seem to be playing an increasingly important role.

Like any new service, we have had our challenges. The most difficult situation that we have faced has to do with obtaining access to cable systems serving the same markets that we serve.

Historically, cable got its start in markets that had very little or no local television, and so we typically face a cable penetration at or above the national average of about 45 percent.

It is very difficult to go out and sell a commercial to a local business if you are shut out of half of the television households in your market. Therefore, getting on cable is very important to low-power stations as for any television station.

No television station has automatic access to cable. Low power has never had such access, and the recent appeals court decision has struck down must-carry for conventional television stations.

Low-power broadcasters, by and large, accept this situation. We feel that if we are offering programming which is of interest to local viewers, then the cable operator has a business incentive to add us to that cable system, and we are willing to live with that marketplace judgment.

However, the marketplace for low power has been badly skewed by uncertainty relating to our copyright status. Because of this uncertainty, many cable operators who wanted voluntarily to carry low-power stations, feared to do so, and this problem has literally threatened the very existence of our industry.

Let me now talk more specifically about this problem, and about H.R. 3108.

Under the compulsory license, cable systems can retransmit local stations without paying copyright fees; but if they import a distant signal, they must pay additional copyright royalties.

As a matter of definitional convenience, the 1976 Copyright Act distinguished between local and distant signals on the basis of whether or not the television signal was a must-carry. This is because the FCC rules in effect in 1976 said that cable systems had to carry regular television stations within their local service area. Any other stations were distant signals.

This definition worked fine as long as all television stations had must-carry. But 6 years later, the low-power service was created without must-carry status. And so, we were immediately thrown into a quandry.

Since low-power stations were not must-carries, they had no specifically defined local service area. Cable operators feared that if they weren't local, LPTV stations had to be distant signals.

If low-power stations were distant signals, the cable operators might have to pay an enormous sum—as much as 3.75 percent of their gross revenues—to carry the local low-power station, even though it might be located literally across the street from the cable system.

Now, this problem created enormous difficulties for our industry just as we were beginning to get underway. In 1984, for the first time, the Commission started issuing a substantial number of LPTV permits on a regular basis; yet at this very time, people in the telecommunications industry broadly became aware of this problem.

And so, many low-power stations ceased being built. No one is going to go out and invest $500,000 in a low-power station if the local cable operator says, "We can't put you on until this copyright issue is resolved."

And so both the cable industry and the low-power industry at the end of last year petitioned the Copyright Office for some assistance. In October of last year, you, Mr. Chairman, and Senator Mathias, sent a letter to the Copyright Office asking them to deal with this issue administratively, pending action by the Congress.

And as a direct result of your letter, the Copyright Office issued an opinion in which they said they would accept, on a temporary basis, the finding that a low-power station is local within an area approximating its coverage area, pending a legislative clarification of the issue.

This ruling provided us with desperately needed relief, and within a matter of days after the Copyright Office put out its policy decision, cable systems started adding low-power stations to their systems on a voluntary basis.

But the Copyright Office ruling, as Mr. Oman just testified, is on an interim and tentative basis only, pending congressional action. And in addition to that, we still have cable systems out there that regard this issue as sufficiently muddy that they are not putting low-power stations on pending additional final legislative clarification.

I know from personal experience that that is the case.

Therefore, it is extremely important to our industry that H.R. 3108, introduced by Chairman Kastenmeier and Congressman Boucher, be enacted as quickly as possible.

Many people may regard this as a technical matter, but to us, it is a matter of crucial importance. And cable systems want to know which low-power systems they can carry if they choose to do so, so that they can make their own judgments as to what programming is in the best interests of their subscribers.

I will conclude by saying that low-power television is a boom still waiting to happen. If this problem is resolved, we can build thousands of stations in the next few years.

Any market in the past which was big enough to have a radio station can have its own local television station. To the best of my knowledge, there is no opposition to this bill, and it would be very, very helpful in assisting our industry to get underway if this bill could be enacted as quickly as possible.

Again, we appreciate very much your leadership, Mr. Chairman, and your leadership, Congressman Boucher, in sponsoring 3108.

[The statement of Mr. Hutcheson follows:]

TESTIMONY OF RICHARD G. HUTCHESON, III

SECRETARY-TREASURER

COMMUNITY BROADCASTERS ASSOCIATION

BEFORE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE

20 NOVEMBER 1985

Chairman Kastenmeier, Distinguished Members of the Subcommittee, my name is Richard G. Hutcheson, III and I am the Secretary/Treasurer of the Community Broadcasters Association (CBA), the trade association representing the low power television (LPTV) industry.

The Community Broadcasters Association was formed in January of this year as a result of the merger of three predecessor low power television groups. Represented on the Board of Directors of CBA are the leading figures in the new LPTV industry, including principal station operators, permittees, programmers and equipment suppliers.

I am also speaking to you as a low power TV broadcaster. I earn my living as the president and principal owner of Local Power Television, Inc., a company which owns and operates three LPTV stations and owns construction permits for an additional dozen stations. In this new industry, our company is perhaps the largest commercial operator of LPTV stations in the United States today.

As LPTV broadcasters, we appreciate very much the opportunity to present testimony before this Committee today. In my remarks, I will cover two areas. First, I will provide an update on the status of the industry overall. What exactly is this new communications technology, low power television, and what has transpired since the Federal Communications Commission (FCC) authorized the LPTV service on March 7, 1982?

Second, I will describe a key difficulty facing the LPTV industry, having to do with the uncertain status of low power television under the Copyright Act of 1976. I will seek to establish that passage of H.R. 3108, which would clarify the copyright status of LPTV stations by defining their local service area, would contribute enormously to the LPTV industry's prospects for fulfilling it's potential as a valuable new communications service available to television consumers.

Finally, Mr. Chairman, let me say that our industry applauds your initiative, and that of Congressman Boucher, in identifying this problem and acting to solve it. We are very grateful for your leadership.

1. Status of Low Power Television.

A. Background. In 1980, the FCC took note of the fact that two significant advances in technology -- satellite distribution of programming, and a revolution in video technology -- made it possible to originate local television programming far less expensively than had ever been the case before.

The Commission further observed that while most large population centers have ample local television service -- three network affiliates, one or more independent stations and a public TV station -- markets with fewer than a quarter of a million persons often are underserved by free, local broadcast television. And even in the very largest cites, there exist ethnic or interest minority groups unable to afford to acquire one of the multi-million dollar television properties which cater primarily to the tastes of the majority of television viewers in the market.

The Commission therefore began accepting applications for a new class of "pint-sized" TV stations to "fill in the gaps" -- literally and figuratively -- around existing television stations and provide service to underserved markets and groups.

B. What is LPTV? LPTV stations are functionally identical to regular TV stations. Like regular TV, low power signals are broadcast through the air. No wires, cables or decoders are required to pick up the signal, which may be viewed on any regular TV channel between 2 and 69.

However, LPTV stations are restricted by regulation to a maximum of 1,000 watts transmitter output. Because of this restriction, "low power" signals typically reach out with a radius of only 20 to 35 miles, while a "regular" TV signal with a much higher transmitter output, may be received 50 to 70 miles or more.

The advantage of LPTV stations, in a nutshell, is that because they are smaller, they are cheaper. The transmitter equipment alone for a conventional TV station may cost $500,000 or more, with total costs for construction, operation and programming exceeding $3 million dollars. By contrast, for the price of a full power transmitter alone ($500,000-$600,000), a LPTV station may be built and operated to the point of projected profitability. A LPTV station may serve one-third of the the coverage area of a regular TV station for well under one-sixth of the cost.

C. Processing Delays Resolved Slowly. The announcement in 1980 of a new television service created an avalanche of nearly 40,000 applications for low power licenses through 1984. As a result of this processing overload, few permits for stations were issued until Congress rescued the situation by authorizing the Commission to use lotteries rather than comparative hearings to award permits sought by competing, mutually exclusive applicants, and by funding the computer system needed to sort out defective applications.

The first low power TV lottery was held on September 29, 1983. Since that time, about 847 construction permits for stations have been awarded and 329 low power stations actually built and licensed, in 37 states. The Commission now holds monthly lotteries, and issues approximately 50 new permits per month. 16,000 applications are still pending before the Commission. Once these applications are processed, the FCC plans to begin accepting new LPTV applications (in 1986).

D. Policy Goals LPTV May Achieve. Because of the substantially lower construction and operating costs for LPTV stations, the service may achieve several important public policy goals.

First, LPTV creates the opportunity to dramatically broaden and diversify the ownership of broadcast properties in the United States. Ultimately, 4,000 or more LPTV stations may be authorized and added to the television spectrum without causing interference to existing, full power TV stations. At a time when owners of conventional TV stations may increase their holdings from 7 to 12 stations, this new avenue for diversified ownership is particularly important.

Second, LPTV makes it possible to have free, local broadcast television in markets which, heretofore, have had none, or have had to rely on big city media outlets 40 to 50 miles away. Residents in smaller communities are just as interested in television coverage of local news and events as are residents of major metropolitan areas.

The fostering and preservation of local broadcast television is an important norm in a day when so-called "superstations" and other national programming networks are dominating cable and capturing an ever-larger market share.

Finally, LPTV makes it possible to offer specialized television programming to viewers with particular interests and needs -- both in big cities and in smaller communities. Ethnic minorities, church groups and others unlikely to be able to afford access to conventional TV stations may use LPTV stations to air programming dedicated to their particular needs and interests.

E. Status to Date. It is important to observe that because of years of processing delays, the LPTV service has just now gotten underway. A majority of the existing permits are less than one year old. However, the FCC is finally issuing a steady stream of permits. With authorizations now in hand, the uses of LPTV thus far have been extraordinarily diverse.

Fully half of the new permits have gone to Alaska, as part of a state-wide educational television network. In the lower 48 states, LPTV permits are about equally distributed among those being used to extend the range of conventional TV stations as translators, religious nonprofit stations and commercial broadcasters. Among the commercial LPTV broadcasters, some are offering specialized programming formats in larger markets, while most are offering local programming in smaller, primarily rural markets which, before LPTV, had no free local television service at all.

As with any new communications technology, low power TV pioneers have had to face many challenges. After years of waiting for the FCC to issue permits for stations, LPTV operators are now confronted not only with financing the new stations, but with developing programming formats which local businesses will support with advertising, and with figuring out how to deal with program suppliers accustomed to the much larger budgets typical for full power stations. For example, my three LPTV stations operate with a monthly programming budget of $3000 each. By contrast, a single episode of a top-rated syndicated series in a major market may sell for $50,000 or more.

Nonetheless, LPTV broadcasters are learning how to deal with these constraints. My stations broadcast 16-24 hours per day, with a schedule which includes 1-3 hours of local programming, plus movies, syndicated series and music videos. We sell commercials to local businesses for $5 to $25 per 30-second spot. Some of our programming is received via satellite from suppliers willing to let us be their local distributor, given that no full power station is available. The centerpiece of our programming, however, is the local news, sports, game shows and special event programming which we originate daily.

F. Critical Problem Facing LPTV: Access to Cable. The single biggest difficulty confronting the LPTV industry thus far has been our effort to obtain access to cable systems serving our local coverage areas. Historically, cable got its start in markets where local broadcast television was spotty or nonexistent. A cable penetration at or above the national average of 45% of local TV households is typical for most markets served by LPTV stations. It is hard to imagine any television station -- low power or full power -- staying in existence if it is denied access indefinitely to cable systems serving half or more of the TV households in the market.

No television station is guaranteed access to local cable systems. LPTV stations have never had so-called "must carry" access and now, as a result of a recent Federal Appeals Court decision, cable systems are under no obligation to carry local full power TV stations, either. This situation is difficult, but "the law of the marketplace" suggests that if a LPTV station is offering programming of interest to local TV viewers, in most instances the local cable operator will have the good business judgement to add it to the local cable system.

The fact that the government has given the low power TV operator a license to broadcast television in a market is not a guarantee of financial success -- nor should it be.

We in LPTV have had an additional problem, however, which has "skewed the marketplace," and made it extremely difficult for our stations to obtain access to local cable systems -- even when local cable operators wished to carry our local programming. This barrier to cable access has threatened the very survival of the new low power TV industry.

2. Copyright Status of LPTV Stations

A. Copyright Act of 1976. LPTV access to cable has been severely hampered by a technicality which was neither desired nor anticipated at the time the Copyright Act of 1976 was passed -- six years before the LPTV service even existed.

Section 111(f) of the Copyright Act defines the "local service area of a primary transmitter" as that area in which a television station may insist that its signal be retransmitted by a cable company. Because all conventional TV stations were subject to mandatory carriage rules in 1976, Congress distinguished between "local" and "distant" signals in terms of the must carry area specified in the FCC's rules. This distinction serves as the basis for computing copyright liability. Retransmission of signals within a "local service area" is royalty free, while retransmission of "distant" signals renders cable companies liable for copyright royalties of up to 3.75% of gross revenues.

B. LPTV Stations as "Distant" Signals. When the FCC authorized the LPTV service in 1982, it did so without granting LPTV stations mandatory carriage on cable systems. Because the Section 111(f) equates "local service area" with "must-carry" privileges, many cable companies feared that the signals of any LPTV stations they carried would be considered "distant" for purposes of computing copyright royalties. This fear was aggravated by an opinion letter from the Copyright Office stating that a "distant signal" definition was warranted by the language of the Act.

Faced with the possibility that they would have to pay 3.75% of gross revenues, few cable systems were willing to add local LPTV stations to their systems. By the end of 1984, as many new LPTV stations began to go on the air, many cable systems which would have otherwise carried their signals refused to do so.

Not only did this problem deny thousands of cable subscribers access to the community oriented programming of local LPTV stations, but without access to local cable subscribers, the very economic viability of the LPTV service itself was threatened. What local advertiser wants to buy a commercial on a station which cannot reach half or more of the local TV households?

Clearly, to consider a LPTV station a "distant signal" runs counter both to logic and to fairness. It is highly illogical in that LPTV stations, with their signal ranges typically limited to 20-35 miles, are by nature the most "local" of all TV stations. It is inequitable in that LPTV stations already pay the licensing rights for programming they use in their local markets. Finally, to regard LPTV station signals as "distant" is to undermine the intent of the Congress to distinguish between truly local and distant signals.

C. Interim Action By the Copyright Office. On September 25, 1984, various representatives of the low power television industry petitioned the Copyright Office to reconsider its position on the status of low power television stations under Section 111(f). On October 1, 1984, Chairman Kastenmeier, joined by Senator Charles McC. Mathias, Jr., wrote a letter to the then Register of Copyrights, David Ladd, asking that administrative action be taken to resolve the cable copyright problem, pending action by Congress.

The Kastenmeier-Mathias letter was of pivotal importance in determining the Copyright Office's Policy Decision of November 19, 1984. Its ruling, in part, stated that:

"... having noted the Kastenmeier-Mathias letter, the Copyright Office has concluded that the status of low power television stations under the cable compulsory license of the Copyright Act is ambiguous. Consequently, the Copyright Office will take a neutral position on this specific issue, awaiting the legislative clarification mentioned in the letter from Senator Mathias and Representative Kastenmeier. (emphasis added) In examining Statements of Account, therefore, the

Copyright Office will not question the determination by a cable system that a low power station's signal is "local" within an area approximating the normal coverage zone of such station."

This ruling provided urgently needed relief to the LPTV industry, and as a consequence, some cable systems added LPTV stations they previously were reluctant to carry. However, the Copyright Office ruling was explicitly made on an interim basis, pending a final legislative resolution. Until legislation is enacted which defines precisely the "local service area" of a low power station, some cable companies still refuse to carry LPTV signals for fear of copyright liability. Thus, action by Congress to resolve this issue once and for all is of crucial importance to the LPTV industry and the communities it serves.

D. H.R. 3108. Following up on the October 1, 1984 letter to the Copyright Office, a Bill has been introduced which would finally resolve this difficult situation facing the LPTV industry due to the uncertainty of its status under the Copyright Act. H.R. 3108, sponsored by the Hon. Robert W. Kastenmeier and the Hon. Frederick Boucher, simply amends Section 111(f) of Title 17, United States Code, to add a precise definition of the local service area for LPTV stations. The Hon. Charles McC. Mathias, Jr. has introduced a similar bill, S. 1526.

The local service area for a LPTV station is defined as comprising an area 35 miles from its transmitter site, or in the case of LPTV stations located within the 50 Metropolitan Statistical Areas with the largest population based on the 1980 U.S. Census, the area is to be 20 miles from transmitter site.

The actual range of a LPTV station's signal depends upon a variety of topographical and engineering factors. In addition to the wattage of the transmitter (limited to one kilowatt for LPTV stations), the height and gain of the antenna are most important.

The large majority of LPTV stations are located in rural areas, near markets with relatively small populations. In these areas, a typical LPTV station with a well-engineered signal may reach 35 miles over open terrain. For the smaller number of LPTV stations serving very large population centers, a coverage area with a radius of 20 miles may be typical, given possible restrictions on tower sites, high buildings and other aspects of metropolitan terrain.

E. Conclusion. A resolution of the copyright issue for LPTV stations is critical if the LPTV industry is to achieve those goals for which the service was created: to diversify the ownership of broadcast properties in the U.S., and to provide unique, locally originated programming to those areas and for those groups underserved by conventional television.

If H.R. 3108 is enacted into law, cable systems will know precisely the geographical area where they may carry LPTV stations without fear of copyright liability. Cable companies will be able to decide whether or not to carry LPTV stations based on their assessment of what is best for their subscribers. LPTV stations in turn will have access to thousands of households within signal range which otherwise would have been denied access to their locally originated programming.

The LPTV industry is exceedingly grateful for the leadership shown on this issue by Chairman Kastenmeier and Congressman Boucher. Those of us who are operating stations know just how critical a resolution of this problem is to our industry. With a solution in hand, we may devote our full attention to providing local television service in our communities of license, and to developing the LPTV industry to its fullest potential.

In conclusion, Mr. Chairman and Members of the Subcommittee, I thank you again for the opportunity to bring to your attention the viewpoint of the LPTV industry.

Mr. KASTENMEIER. Thank you, Mr. Hutcheson.

You say there is no opposition?

Mr. HUTCHESON. To the best of my knowledge, sir, there is none.

Mr. KASTENMEIER. As matters now stand, and as the bill would tend to incorporate this specifically and would clarify the situation, local cable stations are, or would be, free to carry low-power stations within a certain limitation, 20 or 35 miles, as the case may be, but they are not required to.

It is entirely optional with the cable system; is that correct?

Mr. HUTCHESON. That is correct, sir.

Mr. KASTENMEIER. As far as you know, no low-power television station would resist or oppose being carried by the local cable system, is that correct?

Mr. HUTCHESON. That is also correct; it is an advantage to a LPTV station to have as many people in its coverage area view the station as is possible.

Mr. KASTENMEIER. Have you ever run into a situation where a low-power station would, in fact, be a distant signal, and a cable system would want to carry it for any reason?

Mr. HUTCHESON. I suppose it is theoretically possible that a cable system might want to carry a low-power station 40 or 50 miles away, but I think it is highly unlikely. The limited range of a low-power station means that the locally originated programming tends to be rather parochial, and of interest mostly to people who reside within the actual coverage area. So I think that would be an unlikely situation.

Mr. **Kastenmeier**. Though we might understand new low-power systems a little bit better, what programming do you contemplate? Do you contemplate carrying network programming or programming similar to so-called independent television? Or do you contemplate carrying syndicated programming, which is not first run, obviously?

How do you differ from a small independent television station? How do you distinguish the programming which a low-power station might carry?

Mr. **Hutcheson**. In some instances, the programming can be exactly the same. The uses of low-power stations have been extraordinarily diverse. About 850 permits have been granted, and to date, about 330 low-power stations have been built and licensed.

Of this number, about half are in Alaska as part as a State educational public TV system. Of the remaining half, they are about equally divided between low-power stations functioning as translators of full-power stations, nonprofit religious stations, and local independent commercial stations operating much as any other commercial independent station would function.

My own stations, as an example, produce 1 to 3 hours of local news, sports and other programming per day, several movies a day, as well as some syndicated series. We are also able to clear the licensing rights to some programming off satellite.

And most low-power stations operating in a commercial mode offer somewhat of a potpourri of local programming, as well as other programming.

Mr. **Kastenmeier**. To the extent that you use programming off of satellites, do you in fact, compete with a local cable system?

Mr. **Hutcheson**. That is correct. We do not compete, primarily because most low-power stations are free to viewers and advertiser supported, so we are offering free movies, whereas the cable system is selling pay movies, such as HBO, to its subscribers.

So we are a complementary rather than a competitive service. This is why a number of cable systems have sought to add us. We may be the only local station, and we may be providing the only local news in that market.

Mr. **Kastenmeier**. Are the capital costs, the startup costs, of a low-power station considerably less, than, let's say, a small independent television station?

Mr. **Hutcheson**. Yes, sir. The price of a typical full-power transmitter is $½ million. For that $500,000, you can not only buy all of the equipment for a low-power station, but you can build and operate that station over several years to the point of projected break-even.

So it is less than one-sixth of the cost in a typical instance.

Mr. **Kastenmeier**. Do you have any data on how many low-power television stations presently are being retransmitted by cable television systems?

Mr. Hutcheson. To the best of our knowledge, approximately one-third of the operating stations are now being carried by local cable systems.

Mr. Kastenmeier. Now, obviously, this is a copyright issue which perhaps the Congress can resolve. Are there any other copyright issues that are of particular interest to low-power television stations?

Mr. Hutcheson. Not to my knowledge, sir. This is the one issue which has really been of crucial importance to us, and beyond this, I think we would be treated much the same as any other television station.

Mr. Kastenmeier. I would like to yield to the gentleman from Kentucky.

Mr. Mazzoli. Thank you, Mr. Chairman. I won't take the full 5 minutes, so we can make our vote.

But Mr. Hutcheson will recall our conversation in Las Vegas of a couple of years ago——

Mr. Hutcheson. Yes, sir.

Mr. Mazzoli [continuing]. During which the point the gentleman was making then in that forum was really very different than you are making in your statement today, which is why I am a little nervous about this bill.

Because the point the gentleman was making, if my memory is at all accurate, was strictly on must-carry. You didn't talk about the copyright feature, the 3.75 or anything. You said your position was, very strongly articulated, that local power television had a right to be in the must-carry mode, the same as any broadcast signal.

And therefore, that is why I asked the question of the earlier panel, is there a hidden agenda here? Does the adoption of this bill give you, even in this now deregulated climate, any rights more than just simply to allow you to dicker with the local cable system?

Mr. Hutcheson. Absolutely not, and that is why the cable industry supports enactment of this bill. We have never had must-carry status, and I just don't think that is a realistic possibility.

No television station now has must-carry status.

Mr. Mazzoli. But you felt that that was your entitlement, at least a couple of years ago.

Mr. Hutcheson. Well, perhaps I didn't express myself well at that time. We have always wanted to be carried by local cable systems. I think realistically, we have never had a prospect of being included under any must-carry——

Mr. Mazzoli. How does the NAB stand on this?

Mr. Hutcheson. They also favor this bill.

Mr. Mazzoli. Even though it may crowd one of them out?

Mr. Hutcheson. Well——

Mr. Mazzoli. In this deregulated mode, no one is entitled to anything——

Mr. Hutcheson. That is correct.

Mr. Mazzoli [continuing]. If you are on there, and there is a certain track record——

Mr. Hutcheson. I don't think that there is a sense of competition there, because primarily, we are serving markets that are not being served by full-power stations; we may be the only local television station in our market.

Mr. **Mazzoli**. Let me ask you, if I am clear on this bill, to be designated a local signal rather than a distant signal means that those who carry you don't have to pay the 3.75 percent or whatever.

Now, does that mean that actually, copyrighted material is not being paid for except—or how does the copyright owner get paid in this——

Mr. **Hutcheson**. Not at all. What it means is that we don't have to pay twice for copyrighted material. My stations and other LPTV stations have already purchased and are paying the licensing rights to copyright owners for movies and any other copyrighted material we use.

And by designating us as a local signal, the cable operator is freed from being asked to pay for it a second time.

Mr. **Mazzoli**. Does that mean, to ask you the question a second time around, but a little more specifically, that the copyright agencies or groups, those who represent copyright owners and the creative community, are also in support of this bill?

Mr. **Hutcheson**. That is also true to the best of my knowledge.

Mr. **Mazzoli**. In other words, are you telling me that you have the perfect bill; is this—I mean, I have never seen anything like it. You mean to tell me there is no opposition? I can't believe it.

Mr. **Hutcheson**. I think most of the other parties in the communications universe regard this as a rather technical matter affecting what is to them a relatively minor industry, and I think that——

Mr. **Mazzoli**. It is kind of like finding the golden fleece or something, I didn't really believe there was such a thing, I mean, you have found the perfect bill.

Mr. **Hutcheson**. Well, I think it is simply an issue which is of principal concern mostly to us and to the cable industry and not to others.

Mr. **Mazzoli**. We will see what happens.

Thank you very much, Mr. Chairman.

Mr. **Kastenmeier**. In response to the gentleman's comment, it should be noted that the Copyright Office had a public hearing on the same issue, invited a whole plethora of people and associations to testify, and there was no opposition.

The gentleman from Virginia.

Mr. **Boucher**. Thank you, Mr. Chairman.

I just have a couple of brief questions. We have a call to the House, which we will have to depart for momentarily.

You had indicated that the current condition of the law does create an inhibition to some cable companies carrying low-power television. Can you give me some idea of the dimension of that inhibition?

How many cable companies are in that mode today?

Mr. **Hutcheson**. Well, it is hard to estimate, but two-thirds of the low-power stations out there still are not carried by local cable systems. I know from personal experience in attempting to get access to cable systems for my own stations, that some of these cable systems are citing this specific issue as the principal reason for their decision thus far not to add the low-power stations.

Mr. **Boucher**. Can you provide the subcommittee with a list of low-power television stations that have been, to date, denied access to local cable companies with the current condition of the law being cited as the reason for that denial?

I think it would be interesting in particular if you could demonstrate that there are stations there that are ready to go, that are being denied that opportunity in terms of carriage on the local cable, because of the ambiguity in the law today.

Mr. **Hutcheson**. We will be glad to put a list like that together. I know that many, many letters have already been sent to various members, both in the House and the Senate on this specific problem. I will be glad to provide it.

Mr. **Kastenmeier**. Would that be a difficult request? There are many low-power stations in operation. You would have to survey your entire membership to determine——

Mr. **Hutcheson**. We will do that. The only thing I can't guarantee is the compliance on their end. But I would be glad, to the degree that we are able to do so, to put that information together.

Mr. **Kastenmeier**. Well, we would appreciate that.

Mr. **Hutcheson**. Yes, sir.

[The information follows:]

LPTV STATIONS WHICH HAVE BEEN DENIED CABLE ACCESS BECAUSE OF "DISTANT SIGNAL" COPYRIGHT INTERPRETATION

Licensed Stations

K43AJ - Mountain Home, AR, Cecil Fuller
K18AM - Ponca City, OK, "
W51AF - LaSalle, IL, Local Power Television, Inc.
K42AM - Ottumwa, IA, Local Power Television, Inc.
W42AE - Poughkeepsie, NY, Dutchess Community College
K07RO - Douglas, WY, Sky Window TV, Inc.
W22AE - Bucyrus, OH, Allonas Communications
W32AC - Muncie, IN, Don Badgely
K45AJ - Lake Havasu City, AZ, London Bridges Broadcasting
K18AJ - Kalispell, MT, KOUS-TV Channel 4
K19AC - Glasgow, MT, "
K17AD - Lewiston, MT, "
K43AG - Ridgecrest/Inyokern, CA, Edward Tipler, P.E.
W55AS - Milwaukee, WI, Ken Shapiro
K26AC - Bemidji, MN, John Boler
W43AG - Hopkinsville, KY, D.J.Everett

Permittees

W13BE - Chicago, IL, Woods Communications
W08BY - Milwaukee, WI, "
W02BE - Lake City, FL, "
W07BP - Ocala, FL, "
W04BN - Orlando, FL, "
W33AE - Gainesville, FL, "
W18AB - Ft. Myers/Naples, FL, "
W08BX - Oshkosh, WI, Kompas/Biel
K02MU - Lufkin, TX, Attaway Investments
K17AK - Gallup, NM, Buenaventura, Inc.
W66AS - Louisville, KY, J-Pax Broadcasters
K57DG - Enid, OK, Cecil Fuller

Mr. **Kastenmeier**. Thank you very much for your testimony this morning, Mr. Hutcheson. I think it has been very useful. I will have to state that we will be in recess for about 10 minutes, after which we will hear from Mr. Brown, our last witness for the day.

The committee stands in recess.

[Recess.]

Mr. **Kastenmeier**. The committee will come to order.

Our last witness for the day, I am very pleased to introduce, is Rick Brown, General Counsel of SPACE, founded in 1980. SPACE is an acronym, which stood for Society for Private and Commercial Earth stations.

The organizational name later was changed to Satellite Television Industry Association. However, the acronym is a trade association that represents manufacturers, distributors, dealers, and owners of home satellite Earth station equipment.

As far as I know, this is the first appearance of the Earth station industry before the House Judiciary Committee. Mr. Brown is a senior partner in the Washington, DC, law firm of Brown and Finn.

He has been in the law practice in the communications field for the past 10 years. It is a pleasure to have you and your organization before us this morning. I am told that you will start with a technological explanation of your industry, followed by a discussion that highlights legal and policy concerns.

You may proceed as you wish, Mr. Brown.

TESTIMONY OF RICHARD L. BROWN, GENERAL COUNSEL, SATELLITE TELEVISION INDUSTRY ASSOCIATION, INC./SPACE

Mr. **Brown**. Thank you, Mr. Chairman, members of the subcommittee, counsel. I appreciate the opportunity to provide testimony here today. In distinct contrast to radio, television, telephone, and even cable television, the benefits of home Earth stations were first realized in the most rural parts of our country.

For the first time in the history of our country, rural residents are afforded the same access to information, ideas and the works of the creative community, as are urban and suburban citizens.

An Earth station that cost $100,000 10 years ago, today, for a fixed Earth station that can tune one satellite, now costs $1,000. Through American ingenuity technology and entrepreneurship you can buy an Earth station that tunes all satellites that we are going to see today for price ranging from $1,300 to $5,000.

In fact on the balcony, outside of the House, we have an Earth station—similar to the model you have before you, Mr. Chairman—bringing television programs to you. This is what one would typically have in their home.

You also have in the packet of materials furnished, a card which lists the various transponders on the various satellites that we have here in the United States.

We would like, at your convenience, to take you through three of the satellites, just so you can get an idea of the plethora of signals that are available to the American public in their home today.

Mr. **Kastenmeier**. To interrupt, is this called Satellite Orbit bookmark?

Mr. **Brown**. Yes; this is a bookmark that came out of the Satellite Orbit magazine. We have provided you various books that are published weekly, biweekly and monthly, Orbit, Satellite TV Week and ONSAT, in which you can see the kinds of programming that are available.

This card demonstrates the various channels. You are looking now at C-SPAN on satellite F-3. If you look at F-3 on your card, you will see all the programs that are on F-3. This is C-SPAN not through the normal feed that you receive, but direct from the satellite to the Earth station on the balcony of the Rayburn Building.

This is Mr. Hal Haley of Davis Antenna, which is a retailer in the tristate area here. Mr. Haley will help demonstrate the various channels that are available on F-3.

We are now looking at C-SPAN, which is channel 19. I will now flip up. This is Black Entertainment Television; the next channel, the Weather Channel; the next channel is Modern Satellite Network; the next channel is Home Satellite——

Mr. **Kastenmeier**. I am unable to follow you. The next channel on the same satellite?

Mr. **Brown**. Yes. We are right now looking, incidentally, at channel 23, if you can see that, Cinemax. That is scrambled. This is in the Home Box Office family of channels, and this is what the scrambled signals looks like.

The next channel is Arts & Entertainment; next, we will go up to channel 1, Mr. Chairman, Nickelodeon; PTL is the next channel; Trinity Broadcasting; Financial News Network; Satellite Programming Network.

What is the next channel? 6? Flipping to 8, Christian Broadcasting; 10, Showtime, which expects to scramble its signal next summer.

We will now switch to another satellite. By the way, these signals are not the very best one can obtain. We have a tremendous amount of interference in this area caused by telephone transmissions, plus we could not situate the Earth station in an ideal place for this transmission.

In most settings, one could find a place in their backyard or front yard where you can eliminate any sources of interference.

We are now switching to—if you look in the right column, you see something called AD-1, that is the third one down. That is the ANIC Satellite, better picture here, less interference. This is the ANIC Satellite from Canada.

And as we flip through these channels, we are looking now at channel 11, called CBC North, and I am not familiar with all of the various abbreviations, but if we just look through the channels, you will see that some of them are scrambled and some are not.

Mr. **Kastenmeier**. Would this satellite be a Canadian-owned satellite?

Mr. **Brown**. Yes, it is.

Mr. **Kastenmeier**. And licensed? So it would not be in any sense regulated by any of our FCC regulations or any other laws?

Mr. **Brown**. That is correct.

[Video presentation.]

Mr. **Brown**. We are, of course, receiving Yogi Bear in French.

Thank you.

And now, this is the equivalent of C-SPAN. This is the Parliament of Canada, which has not started its broadcasting today.

Hal, if we can now switch to another satellite, we are going to go to F-4, which is the last satellite listed on the same page.

While he is doing that, as you will notice, you can turn this over and you can see the vast number of channels that are available on other satellites, as well to the home viewer.

What this allows a home viewer to do is access everything that is on television. It provides rural citizens, people that can't watch broadcast TV, people that never had access to cable, and even people that do have access to cable—it permits their own choice—the freedom to choose what they want to watch, irrespective of what the cable operator wants to deliver.

If it is a noncabled area, of course, it makes a first-class citizen, communications-wise, out of all citizens that have Earth stations.

Mr. **Kastenmeier**. Mr. Brown, does this mean literally that with one Earth station, you have access to all these satellites?

Mr. **Brown**. Yes, Mr. Chairman.

Mr. **Kastenmeier**. The reason I ask is that I have noted in some years past that some of the cable stations had a series of dishes. Apparently they were fixed, and they were not rotating, but each was fixed to a given satellite.

I don't know why they wouldn't have a single satellite rotating to the given satellite.

Mr. **Brown**. The reason for that is because the cable has to receive all of the signals from one satellite at one time, because different viewers down the line are watching different programs.

In the case of a home Earth station, you are basically one program on one satellite at a time. You can then turn the dish to another satellite.

So, therefore, we have the opportunity to watch everything with one dish.

Mr. **Kastenmeier**. Let me ask you, is it possible, then, for a homeowner with a single dish, with two or three receivers, to watch two or three different programs from the same satellite.

Mr. **Brown**. That is correct, Mr. Chairman. That is called block down conversion, where all the signals are blocked down in a block. There has to be a receiver in each room of the house, and they can then watch different channels at the same time, off the same satellite.

We are now looking at the last part of the demonstration, which is F-4. This is channel 19. This is WPIX, one of the so-called superstations out of New York; and as we flip through, this is Home Team Sports, which is a local, regional channel out of the Washington, DC area, there is the local basketball, hockey and other sports; I believe this is MTV, it needs no further introduction.

What channel is that? That is channel 4 and this is Nickelodeon, which is children's programming.

Mr. **Kastenmeier**. You are moving then from one satellite to the other?

Mr. **Brown**. At this point, we are on F-4, and we are just going from channel to channel on F-4. That is the last satellite on your right, at the bottom of the page.

Mr. **Kastenmeier**. But you don't have Home Team Sports on F-4, it is on G-1.

Mr. **Brown**. I could see you would have no trouble owning one of these, Mr. Chairman, you figured out exactly how it works.

Are there any other channels that anybody would care to see before you conclude the demonstration?

Mr. **Kastenmeier**. No, I think it was amply demonstrated.

How about American Ecstasy?

Mr. **Brown**. Fortunately, or unfortunately, that is on later.

Thank you, Hal.

Since the birth of this exciting technology only 6 years ago, there have been many who have opposed its existence, and worked overtime to stymie its development. For the first 5 years, competing technology has called us pirates.

Many of us sent payments to subscription services, only to have the checks returned with letters warning us that viewing a pay television channel was against the law. A major cable system sued a retailer of Earth stations, claiming violation of Federal law, both copyright and communications.

A Federal District Court said otherwise, in the *Starlink* case.

From 1979 to 1983, there were four unsuccessful efforts in the U.S. Congress, which, if successful, would have put this technology out of existence.

Finally, in 1984, the legality of home Earth stations was clarified by the *Starlink* case and by the U.S. Congress. Through the satellite viewing rights provisions now contained in section 705 of the Communications Act, it became clear that the manufacture, sale and use of home satellite Earth stations and the viewing of unscrambled signals was perfectly legal.

Marketplace compensation mechanisms for programmers was assured through either one, encryption, or two, the development of so-called marketing plans for unscrambled services resulting from fair and open marketplace negotiations.

Turning to the issue of compensation, the home satellite Earth station industry has always agreed that copyright holders deserve to be fairly compensated. That is why, in 1981, again in 1982, and in 1983, SPACE's testimony before the Congress, included the notion of a point-of-sale license fee—the notion that we would negotiate a payment mechanism for viewing.

There were no takers on our offers. Thus, our industry's philosophical commitment to compensate copyright holders is well documented.

Another, more practical reality, makes compensation of copyright owners a priority. And that is the introduction of scrambling, which you saw a few minutes ago.

With the imminent distribution of some signals in a scrambled mode, it is clear that programming can be easily withheld unless the demanded payment is made. That is why a fair and equitable resolution to the issue of compensation for programming via home Earth stations is essential.

Our offers to negotiate fair payment mechanisms were not made because home Earth station viewing violated copyright law, that was made clear before, but because we always recognized that as a responsible member of the communications industry, the home satellite Earth station industry should pay its fair share to compensate the creative talents that provide programming.

For without them, our industry, as we know it today, would not exist.

Currently, there is a not-so-invisible third party at the table that is attempting to control distribution by satellite programmers. That party in the cable industry.

Cable is no longer the mom-and-pop business it was 10 years ago when you first considered the compulsory license. Over one-third of all basic cable subscribers are served by the top five MSO's.

Two-thirds of cable systems with less than 2,500 subscribers are owned by the MSO's. Today, the cable industry is a multibillion dollar, vertically and horizontally integrated, group of conglomerate companies which have, in some cases, grown arrogant, anticompetitive, and unresponsive to the needs of the public.

One only need look in our own backyard in the District of Columbia and Montgomery County to witness the multitude of problems we are experiencing nationwide with cable television.

Cable companies are able to behave in this manner because there is in actuality little competition to them in the delivery of multiple channels of programming.

Great pressures have been brought upon the programming industry, by the Nation's largest and smallest cable companies, not to do business with the industries which are competitive to the franchised cable television business.

Currently, franchised cable operators are attempting to coerce all satellite services into scrambling, some of which have little or no incentive to do so. At trade shows of both the NCTA and CATA, the word went out that all program services must scramble, and the word went out that programmers must be cable-friendly.

The word went out that cable wanted exclusive distribution rights inside and outside of their franchised areas to maintain what they call the integrity of their product.

Cable wanted no competition, no alternative distribution. The NCTA even commissioned a study that proved that every Earth station consumer represents a $1,000 potential loss on the balance sheet of the cable operator.

After sufficiently rousing the troops, the NCTA proposed a consortium of all cable operators to provide the programming pipeline to home Earth station owners, a pipeline to people who could not find the cable operator in the first place, when they wanted service in rural areas. A pipeline to those who did not care for the quantity or quality of service being provided by the cable operator.

Cable was saying, "You have to buy from the person who doesn't serve you well." The cable operators have threatened to deprive millions of now existing cable consumers of services they now receive if the programmers did not scramble.

The threats became so onerous that programmers formed their own consortium to resist cable, they had consortium A and consortium B. But now it appears that the cable consortium has broken the backbone of the programmer consortium, which appears not to exist anymore.

HBO, sister company to ATC, the second largest U.S. cable operator, seeks to charge home dish owners some 300 percent more than it charges cable companies for the very same product.

CNN and ESPN are seeking to impose rates, upon home satellite Earth station consumers, for unscrambled signals. These rates are up to 1,000 percent higher than that which is charge cable operators.

The question must be asked whether this is simple greed or an untoward monopolistic fever. The purpose of these efforts, it is submitted, is not to ensure fair compensation to copyright holders, it is to ensure that cable operators will continue to monopolize the satellite distribution of programming.

If the cable operators are permitted to control the viewing of satellite services, copyright holders will be harmed. They will be denied a new and otherwise vigorous market tier of their product.

We are thankful that the Department of Justice has announced that it has initiated a formal investigation into the policies of program services and cable operators with respect to the home Earth station market.

Now, I would like to look at the compulsory license for a moment. Cable has benefited. Cable operators pay only a fraction of their revenues for the privilege of carrying broadcast signals. The public has benefited, too, by the expansion of cable services.

Copyright holders have derived substantial benefits, rising to some $100 million in 1985, from cable distribution of programming. Let us remember, the purpose of the compulsory license is to overcome the problem of negotiating with hundreds or thousands of copyright holders.

But more important, it was adopted to ensure the widest possible distribution of the benefits of copyrighted programming.

Satellite technology is the third generation. First, we had broadcasting, where you had to be within the transmitting zone. Then there was cable which serves mostly densely populated areas. Now, satellite Earth stations serve consumers everywhere.

In more suburban and urban areas, it is providing virtually the only form of competition to cable. The Congress deregulated cable from local regulation just 1 year ago.

Cable's actions since have been an attempt to formulate a monopolistic, nationwide empire with scrambled signals being sold an inflated prices, undermining the competitive thrust from this new technology you see here today.

Quite frankly, I hope you have come to believe the home Earth station manufacturers in this country may have built a better mousetrap, one which is capable of serving all Americans on perhaps a more economical basis than cable. And the public has a right to explore this alternative technology.

Cable's scramble to protect its industry is not surprising, but its modus operandi is to protect its investment through anticompetitive actions and ultimately, the consumer must bear the burden of those actions through increased prices.

Because the main purpose of cable's compulsory license is to enrich the public domain by expanding the delivery of television services, it follows that if the beneficiaries of that license act anti-competitively to restrict the delivery of that programming, the rationale of their compulsory license should be called into question.

When cable operators act anticompetitively to restrict the market, the delivery of satellite services, they no longer deserve the benefit of their compulsory license.

We are suggesting that there be preconditions to the compulsory license. They should be investigated in order to obtain a truly progressive system of distribution of copyrighted materials. Satellite Earth stations represent a potentially large market in their own right.

They certainly now provide competition which does engender program initiatives. The copyright laws, it is submitted, were designed to promote, not to restrict. We think we can do this through satellite Earth station technology, and we would be more than happy to provide the subcommittee with suggested legislation in the areas we have discussed today.

I thank you for this opportunity and welcome your questions. Thank you.

[The statement of Mr. Brown follows:]

TESTIMONY OF
RICHARD L. BROWN, GENERAL COUNSEL
SATELLITE TELEVISION
INDUSTRY ASSOCIATION, INC./SPACE

SUMMARY

Home satellite earth station technology has ushered in a new age in the reception of direct-to-home video communications. For the first time in history, a technology has developed which offers each and every American, regardless of whether he or she resides in rural, urban or suburban areas, identical opportunities to view a multitude of information, education and entertainment programming.

This is an opportunity which has been previously unavailable to millions of Americans nationwide, simply because prior state-of-the-art technology could not distribute video programming effectively or economically to rural Americans. But the home satellite revolution ends the era of discrimination against rural Americans. And as with any technological revolution that makes copyrighted material more widely available, a mechanism must be developed to ensure that copyright holders are treated fairly and equitably.

For a variety of other reasons, including the potential competition home earth stations pose to cable television systems, cable operators and their affiliated program companies have engaged in anticompetitive and monopolistic behavior vis-a-vis the home satellite earth station industry. This anticompetitive behavior is not in the best interest of copyright holders and will result ultimately in increased and inflated prices to the consumer for subscription programming. Such a result cannot possibly serve the public interest. Because cable is the beneficiary of a compulsory copyright license to carry broadcast programming, it is suggested that continuance of the compulsory license be predicated upon fair treatment by both cable companies and their affiliated subscription programming companies of home satellite earth station users.

Mr. Chairman and members of the Subcommittee, thank you for the opportunity for the satellite television industry to provide testimony today. I am General Counsel of SPACE, The Satellite Television Industry Association, Inc. SPACE represents manufacturers, distributors, retailers and consumers of satellite earth stations. Our membership includes individual owners of satellite earth stations, as well as small mom and pop retail operations and large companies that produce, distribute or sell home earth station equipment. Our membership comes from all the 50 states and several foreign countries.

SPACE welcomes the opportunity to participate in these hearings on the impact of new technologies on the Copyright Law and to comment upon the growth and future of the home satellite earth station industry and the consumer benefits it provides.

The evolution and geographical service characteristics of satellite technology are unique in American history. As a technology, it was initially developed almost exclusively by the taxpayer's investment in propulsion technology and the space race, during the 1940s through 1970s. In distinct contrast to radio, television, the telephone or even cable television, the benefits of home earth stations were first realized in the most rural parts of our country. Through satellite technology, for the first time in the history of our country, or any other country, rural residents are afforded the same access to information, ideas and the works of the creative community as are their urban and suburban counterparts. As satellite technology is enriching the lives of rural and other Americans, the purpose of the Copyright Law is also served. As stated recently by David Lange, Professor of Law, of Duke University before the Subcommittee, "The ultimate purpose of Copyright is not to protect authors, but rather to enrich the public domain." However, it should be emphasized that providing author's compensation for their works is a concept we have continuously embraced and I will return to this concept later.

Ten years ago, a satellite earth station installation cost $100,000. The Federal Communications Commission had a rule requiring, in effect, ten meter diameter dishes. Eight years ago, the FCC changed its rule and five meter diameter earth stations became available and more widely used by the industry, particularly cable television, as prices tumbled to $25,000 for a typical earth station installation. Rapid price declines ensued in the 1980s as the home earth station market started and dishes below 5 meters in diameter were manufactured. Today it is possible to buy a six-foot, fixed-position satellite receiving system which will produce quality pictures for under one thousand dollars. Consumer prices for 8 to 10-foot satellite antennas that tune-in all domestic satellites, range from about $1,300 to $5,000. Mid-priced units today, produce better quality pictures than the best available ten years ago.

Satellite Television - Growth in spite of adversity.

Since the birth of the home earth station industry only six years ago, there have been many who opposed its existence and worked hard to stymie its development. For the first five years, competing technologies called us "pirates." They tried vigorously to stop the growth of this industry. Although earth stations were used to view many satellite services which welcomed viewing by dish owners, letters threatening legal action were sent to dish manufacturers, retailers and owners by other program services, principally pay movie services. Many earth station owners sent payment to those services only to have their checks returned with letters warning that viewing the pay television channel was against the law. A major cable television company went so far as to sue a retailer of home earth stations alleging that the sale and use of this equipment violated state and federal law (Consumer and Copyright). However, a federal district court judge found for the home satellite antenna retailer on all counts in AirCapital Cablevision, Inc. v. Starlink Communications Group, 601 F. Supp. 1568 (D. Kan. 1985).

Additionally, from 1979 to 1983, there were four legislative efforts in the United States Congress which, if successful, would have put the satellite earth station industry out of business. On each occasion rural Americans, along with others concerned with encouraging the expansion of technology and service in a competitive marketplace, (including many members of Congress) rallied to help insure the survival of the opportunities made possible by home earth stations.

Finally, in 1984, the legality of home earth stations was clarified by the Starlink case and by the United States Congress. Through the satellite viewing rights provisions contained in the Cable Communications Policy Act, (Section 705 of the Communications Act), it was made clear that the manufacture, sale and use of home satellite earth stations and the viewing of unscrambled satellite programming was legal. Marketplace compensation mechanisms for programmers was assured through either encryption or the development of a "marketing plan" for unscrambled services which resulted from fair and open marketplace negotiations. At the same time, substantial additional penalties were provided for the theft of cable television service, as well as commercial violations of Section 705 of the Communications Act.

The Issue of Compensation

While receipt of programming by a home earth station user does not violate the 1976 Copyright law, the home satellite earth station industry has always agreed that copyright holders deserve to be fairly compensated. That's why in 1981, and again in

1982 and 1983, SPACE testified before the Communications Subcommittees in the House and the Senate offering to negotiate a payment mechanism for viewing the major satellite subscription (theatrical motion picture) services — which were the most vocal opponents of our technology. We even offered to negotiate a point-of-sale license by which a negotiated fee would be placed on the sale of home satellite antennas and the proceeds derived from that fee would be used to compensate copyright holders. This offer was made to all the major subscription programming services and the motion picture interests. A copy of an offer to negotiate a point-of-sale license is attached as Exhibit 1 to these remarks. There were no takers to our offers. You will notice, of course, the similarity of the concept to one later endorsed by the Motion Picture Association of America with respect to video cassette recorders and videotapes.

Thus, the home earth station industry's philosophical commitment to compensate copyright holder's is well-documented. But irrespective of our good intentions, another more practical reality makes compensation of copyright owners a priority and that is the introduction of scrambling technology. With the current distribution of signals in a scrambled mode, it is clear that programming can be easily withheld unless the demanded payment is made. That's why a fair and equitable resolution to the issue of compensation for receipt of programming via home earth stations is essential.

This industry's offers to negotiate a fair payment mechanism were made not because private viewing of satellite programming violated the Copyright Law, but because we recognized that as a responsible member of the communications industry, the home satellite earth station industry should pay its fair share to compensate the creative talents that provide programming to the satellite distribution system. From the very beginning, we felt that it was in the long-term best interest of the home satellite earth station industry to work out a fair means of compensating satellite subscription services, for without them, our industry as we know it today, would not exist.

Role of Cable

Currently, there is a not so invisible third party at the table that appears to be attempting to control distribution by satellite programmers. That party is the cable television industry. Cable television is no longer the mom and pop business it was a decade ago. Since 1976, ownership of cable systems has consolidated to the point where today, 25 Multiple System Operators (MSOs) account for over 70 percent of the 32 million basic cable subscribers. According to NTIA, over one-third of all basic cable subscribers are served by the top five MSOs. Two-thirds of cable systems with less than 2,500 subscribers are owned by MSOs.

Today the cable television industry is a multi-billion dollar vertically and horizontally integrated group of conglomerate companies which have, in some cases, grown arrogant, anti-competitive and unresponsive to the needs of the public. One need only look in our own backyard — in the District of Columbia and Montgomery County — to witness the multitude of problems with cable television. These problems are a nationwide phenomenon. Cable companies, in many jurisdictions, are able to behave in this manner because there is, in actuality, little competition to them in the delivery of the multiplicity of television channels available today.

We have seen great pressures being brought upon the satellite programming industry, by the nation's largest and smallest cable television companies, not to do business with those industries which are competitive to the franchised cable television business, that is, to the home earth station market and the satellite master antenna television (SMATV) market. Several years ago, the Arizona State Attorney General brought an antitrust suit because of the refusals of some programmers to sell to SMATV operator. The case was ultimately settled with the satellite services required to do business with the SMATV operators in that state.

Now, franchised cable operators are attempting to coerce all satellite services into scrambling, some of which have little or no incentive to do so. At trade shows of both the NCTA and CATA, the word went out that all program services must scramble. And the words went out that programmers must be "cable friendly." That means to distribute programming in a manner favorable to cable and unfavorable to the home earth station owners, i.e., at uncompetitive prices in order to maintain local monopolies. The word went out that cable wanted exclusive distribution rights inside and outside of their franchised areas "to maintain the integrity of their product." Cable wanted no competition, no alternative distribution. The NCTA commissioned a study to prove that every earth station consumer represents a $1,000 potential loss on the balance sheet of a cable operator. After sufficiently scaring the troops, the NCTA proposed a consortium of all cable operators to provide the programming pipeline to home earth station owners; a pipeline to people who could not find the cable operator when they desired programming in the first place; a pipeline to those that could find the cable operator but did not care for the quality or quantity of service being provided.

The cable operators have threatened to deprive millions of consumers of service by dropping services that did not scramble. The threats became so onerous that programmers formed their own consortium to resist cable. But now it appears that the cable consortium has broken the backbone of the programmer consortium.

HBO, sister company to American Television & Communications Corp., the second largest U.S. cable television operator, seeks to charge home dish operators some 300% more than it charges cable companies for the very same product.

CNN and ESPN are seeking to impose rates upon home satellite earth station owners for unscrambled signals — up to 1,000% higher than they charge to cable systems.

The question must be asked whether this is simple greed or untoward pressure to be "cable friendly." The purpose of these efforts is not to insure fair compensation to copyright holders. It is to insure that cable operators will continue to monopolize satellite distribution of programs. The cable operators have little financial incentive to market agressively home satellite earth station service within or adjacent to their service areas. If they are permitted to control the viewing of satellite services by home earth station owners, copyright holders will be harmed. They will be denied a new and otherwise vigorous market for their product. We are thankful that the United States Department of Justice has announced that it has initiated a formal investigation into the policies of the satellite services and cable operators with respect to the home earth station market.

The Compulsory License and Deregulation

At this point, let us look back at the compulsory license and cable deregulation. To a large extent, the growth and consolidation of power of the cable industry that took place is a direct result of the benefit conferred by the compulsory Copyright license afforded cable by Congress. During at least the first 30 years of its existence, the backbone of the cable television industry was the delivery of more, and better quality, broadcast signals. The retransmission of these broadcast signals enabled cable to survive and prosper during this period, and develop the base of service and revenues which led, in the mid 1970s, to the development of satellite-delivered non-broadcast programming as an add-on feature. Cable has benefitted substantially from the compulsory license. Cable operators pay only a fraction of their revenues for this privilege as compared to broadcast stations. The public too, has benefitted, in our view, by the expansion of television services to unserved areas, and the opening up of new markets for non-broadcast programming. The growth of cable television has provided a new tier in the distribution of theatrical motion pictures benefitting the creative community. Copyright holders have also derived substantial benefits from the compulsory license. It is now estimated that during 1985 those fees will rise to $100 million from $13 million in 1978.

The purpose of a compulsory license granted to cable television operators was two-fold. It was adopted in recognition of the substantial difficulty posed to cable operators in negotiating with hundreds or thousands of individual copyright holders for the retransmission of their programming. Another, and perhaps more important purpose, was to insure the widest possible distribution of the benefits of copyrighted programming.

Satellite earth station technology is really the third generation in the development of a nationwide direct-to-home video communications system. First, there was broadcast television which served only those Americans living within the range of the broadcasting facility. Next, there was cable, which could extend the range of a broadcast station to include those residents in relatively high density areas which were connected by cable to a central headend which received broadcast signals and also provided non-broadcast programming. Now, the third generation, home satellite technology, provides each and every American, irrespective of population density, with the identical opportunity to receive direct-to-home video communication. It is truly the first nationwide direct-to-home video communications system our country has ever had. Just as yesterday, cable television brought the benefits of American television to areas which broadcast stations couldn't reach, today satellite earth station antennas are bringing satellite programming to hundreds of thousands of people in areas too remote for cable television. In more suburban and urban areas it is providing virtually the only form of competition to cable television for the delivery of multiple over-the-air non-broadcast programming directly to the home. The Congress deregulated cable from local regulation one year ago. Cable's actions since then have been an attempt to formulate a monopolistic, nationwide empire with scrambled signals being sold at inflated prices, undermining the competitive thrust from a newer technology.

Not only do home satellite earth stations compete with cable, but quite frankly, home earth station manufacturers may have "built a better mousetrap" so to speak — one which is capable of serving not just some, but all Americans on perhaps a more economical basis than cable and the public has a right to explore this alternative technology. Cable's scramble to protect its industry is not surprising — but its modus operandi is to protect its investment through anticompetitive actions and ultimately it is the consumer that must bear the burden of cable's actions, through increased and inflated prices for subscription programming. Such a result cannot possibly serve the public interest.

Because a main purpose of cable's compulsory copyright license is to enrich the public domain by expanding the delivery of television services, it follows that if the beneficiaries of that license act anti-competitively to restrict the delivery of that programming, the rationale for their compulsory license is called into question. When cable operators act anti-competitively to restrict the market for the delivery of satellite services, they no longer merit the compulsory license (irrespective of whether the compulsory license may be unwarranted for other reasons).

We urge this Subcommittee to consider specific legislation conditioning the compulsory license granted to cable television operators upon a continued demonstration that such operators are not acting anti-competively. Where a cable operator obtains an exclusive right to distribute satellite programming to home earth station owners, that cable operator should not be entitled to a compulsory license for the retransmission of broadcast signals. Where a cable operator is related to a program service which does not sell to non-cable distributors, the cable operator should not be entitled to a compulsory license. Where the cable company, or a related entity, engages in refusals to deal or other anticompetitive acts which have the effect of restricting competition in the distribution of programming by satellite in the community, the operator should not be entitled to a compulsory license for the distribution of broadcast signals. These and other preconditions to the compulsory license should be investigated in order to obtain a truly progressive system of distribution of copyrighted materials. Satellite earth stations represent a potentially large marketplace in their own right. They currently provide competition which engenders programming initiatives. The copyright laws were designed to promote, not to restrict.

We would be happy to provide the Subcommittee with suggested legislation in the areas we have discussed today. Thank you very much for the opportunity to introduce our industry to you today.

Respectfully submitted,

THE SATELLITE TELEVISION INDUSTRY ASSOCIATION, INC./SPACE

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Richard L. Brown, General Counsel

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EXHIBIT 1

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November 6, 1981

Jack Valenti, President
Motion Picture Association of America
1600 Eye Street, N.W.
Washington, D.C. 20006

Dear Jack:

We are General Counsel to the trade association SPACE (the Society for Private And Commercial Earth Stations) and are contacting you regarding H. R. 4727, introduced by Congressman Waxman last month. SPACE represents the manufacturers, distributors and owners of satellite receive-only earth stations. Its membership consists of New York Stock Exchange and smaller companies, as well as individual owners of satellite receive-only earth stations.

SPACE is sensitive to your desire to eliminate piracy of programming and we wish to be able to support the Waxman Bill. However, SPACE cannot support this Bill in its present form because it amounts to much more than an "anti-piracy" Bill. Passage would have a devastating effect on the public who use satellite earth stations for education, instruction, information and entertainment purposes. Passage would also severely inhibit the advancement of technology by the earth station industry. The industry has successfully engineered a ten-fold reduction in the price of equipment over the last three years. Any cloud over the business will drive the responsible manufacturers out of the business, thus reducing the chances of further technological improvements for consumers.

Backyard satellite earth stations are used largely to fulfull vast chasms in television viewing opportunities for American farmers and ranchers — those Americans who live in mountainous terrain, desert areas and other places where cable television is not available or feasible. Backyard earth stations are now providing - for the first time in thirty years - equal television viewing opportunities to rural Americans. Backyard earth stations also fulfill the desires of those who have for years patiently awaited the advent of cable service in urban and suburban areas, but where cable service is not yet forthcoming. An additional benefit of backyard installations is that they serve as a competitive spur to cable . . . their existence will encourage cable to enhance the number of services provided to subscribers. As you know, a significant number of cable systems still carry no pay television programming, and a large number carry only one pay service. Both of these circumstances are to the detriment of your member companies.

November 6, 1981
Jack Valenti, President
Motion Picture Association of America
Page Two

In considering the Waxman Bill, two important distinctions must be drawn between MDS and STV, on the one hand, and earth stations on the other. First, MDS/STV are single channel systems. The only purpose of an "unauthorized" MDS antenna/down-converter or subscription television decoder is to pick up a subscription signal. An earth station, however, is employed to pick up a wide variety of other signals as well, signals which many program suppliers wish the American public to view. Second, and in great contradistinction to the pirating activities that thwart the enterprises of your member companies, SPACE believes that there should be a reasonable payment for subscription programming. If program suppliers however do not want to accept payment, then the non-commercial use of backyard earth stations should be freely permitted.

Therefore, we forward to you, on behalf of SPACE, a proposal to pay for the programming of your member companies. What our members do - view programming - does not violate the Copyright Laws. Your member companies will, therefore, derive profits where there are now none. In 1980, the backyard earth station industry was a one hundred million dollar business. With the cost of equipment rapidly declining, the industry expects that millions of installations will be made in the next few years. If we can reach accord, your member companies will derive millions of dollars in revenues. What we are proposing is a Congressionally-sanctioned marketplace solution: a point of sale collection of a fee for subscription viewing. We suggest this method because it helps to insure total compliance by the purchasing public; it is enforceable; it is administratively convenient; and it is a worthy precedent for your member companies.

We would look forward to meeting with you to discuss this further.

Yours truly,

SPACE

Rich

By: Richard L. Brown
Its Attorney

RLB:mb

Enclosure: MEMORANDUM

cc: Fritz Attaway
Motion Picture Association of America

Society for
Private
And
Commercial
Earth Stations

1920 N Street Northwest
Suite 510
Washington DC 20036
(202) 887-0605

MEMORANDUM

TO: Program Supply Industry

FROM: SPACE (the Society for Private And Commercial Earth Stations)

DATE: November 6, 1981

SUBJECT: Waxman Bill, H. R. 4727 - Proposal For Compensation to Subscription Program Suppliers and Packagers

SPACE proposes the following plan of compensation to subscription program suppliers and packagers:

1. Earth station purchasers pay a use charge, at the point of sale, for the useful life of the earth station.
2. The charge is collected by the selling company and forwarded to a designated private or governmental organization for collection and distribution.
3. SPACE and the program supply industry support provisions for penalties in the Waxman Bill for failure to collect or turn over such use charges, and provisions sanctioning this plan.
4. The collection organization could be either the Copyright Office or a non-governmental organization selected by the intended recipients of funds. The methodology for distribution of funds would be solely the decision of the recipients of the funds.
5. The use charge would be a one-time charge for each earth station facility sold. The use charge would be subject to annual adjustment (based on agreed criteria) for earth stations sold in each succeeding year.
6. The use charge would be the average bulk monthly price of a subscription service (adjusted annually), multiplied by the average number of subscription services taken by cable television subscribers nationwide (adjusted annually), multiplied by the useful life of an earth station (in months), the total then discounted to present value.

   Use Charge = average bulk monthly price x average nationwide number of subscription cable services x useful life (in months) (discounted to present value).

7. Each year a survey, or industry statistics, would be used to determine the average number of pay services taken by cable subscribers nationwide.
8. Subscription programmers would be free to encode signals. Such programmers would not be able to participate in distribution of funds from the pool, as they would be paid directly. Likewise, rates charged by such companies would not be included in determining the average bulk price of pay services in the above formula. Companies encoding programs made available to cable television subscribers would be required to authorize decoder use by backyard users; the backyard users would be authorized to purchase these decoders and pay program suppliers directly.

Mr. KASTENMEIER. Thank you very much, Mr. Brown.

You speak of specific legislation relating to the compulsory license granted to cable TV; and other ideas you have in mind, legislatively. Of course, we would be interested in seeing what you have more specifically.

I noted before, in H.R. 1840, there is a provision in title VII, the Tauzin bill, relating to what appears to be the equivalent of a compulsory license outside of copyright, section 702.

You are familiar with that. I take it you support it. Did you play a role and were you consulted in the preparation of that sort of language?

Mr. BROWN. Yes, we were, Mr. Chairman, and this industry supports the Tauzin legislation, also the moratorium legislation, the Gregg bill, and there is a similar bill to Congressman Tauzin's bill in the Senate, which was introduced by Senator Gore.

Mr. KASTENMEIER. In it, I am not clear on what you have in mind. Apparently, you have in mind prices, terms and conditions established in the marketplace or by the FCC itself. I'm just curious how you expected that to operate.

Mr. BROWN. We do not want to see these prices determined in any way but by the marketplace. But I am not sure that is going to happen. These bills are an attempt to make sure that if, as a last resort, marketplace forces don't work, that there is a speedy remedy, and that remedy is with the FCC.

The real operative provisions of this legislation, as I see it, is to require that there be reasonable charges, that there isn't a restriction on programming through the so-called "cable-friendly" attitude that the cable operators are requiring of the programmers. Let me explain that.

Cable operators want to control the mechanism, the pipeline of getting the programming to the home Earth station owner, whether or not the home Earth station owner lives within the franchise.

It is very simple to understand the concept that if it goes through the cable operator, it is not going to be at a competitive price. It is going to be a monopolistic price, because there is no competitor to the cable operator.

If, for example, Home Box Office sold its programming to somebody that was not in the cable business, whether it be a manufacturer or a new distributor company that was not a cable operator, you would then have somebody going around to Earth station owners in cable areas trying to sell the HBO product in a competitive way to TCI or ATC or whatever the cable company might be.

There wouldn't have an artificially high price. If we look at what HBO has done as far as its structure, it has said, "Look, we have an 800 number you can call and you can pay $12.95 for HBO, or you can buy it from your cable operator."

Now, we don't know what the cable operator is going to charge. It could charge $12.94 and steal all the business away from HBO. But we really question whether the homeowner price needs to be $12.95. Is that a fair price? Maybe, maybe not. We would like to see the marketplace determine that price.

If there were other distributors, we wouldn't need the Tauzin legislation. We wouldn't need the Gore legislation. But there aren't. There is tremendous pressure being placed by the cable operators on the programmers, saying don't be cable-friendly, sell through us. And that is the problem.

Whether this is a compulsory license or not depends on how you look at it. If you are a utility lawyer, I think you would say it is a utility regulation; if you were a common carrier, you would say it is a common carrier. There are aspects of compulsory license here.

We would rather not see the FCC in the picture; in fact, the provisions that deal with the FCC are there for one reason only. They are not essential to the other purposes of the bill. They are only there to give consumers a quick remedy in case scrambling does occur.

We heard testimony earlier today from the Office of the Register of Copyrights that there will be 100,000 decoders available sometime next year. We have got 1.75 million consumers out there.

I think there will be chaos. And I think that is unfortunate, although I think that scrambling is a fair way to achieve payment, it is not the only way. You asked that question before, but it is a fair way.

Mr. **Kastenmeier**. Let me go back to square one. I guess my questioning didn't probably follow any sequence.

Let me go back and ask you a copyright question: section 110, subsection 5, of Title 17, United States Code, says "There will be no copyright liability for communication, transmission and reception of the transmission on a single receiving apparatus of the kind commonly used in private homes."

Do you think that an Earth station is a receiving apparatus of a type commonly used in the home, thereby removing it from any copyright liability?

Mr. **Brown**. Yes, I do believe that, if I am not mistaken, I believe that section may have to do with commercial establishments and the placement of apparatus such as common radios or television receiving sets, and now home Earth stations, in commercial establishments, and exempting them from copyright in that area.

However, to answer your question in another way, I think in the very definition of copyright and as attested to by the Register this morning, this home Earth station owner does not engage in a public performance, and therefore, is exempt under that section, rather than the commercial establishment exemption.

Mr. **Kastenmeier**. Therefore, you feel that under copyright law that an Earth station owner may be exempt from paying a royalty. Is that correct?

Mr. **Brown**. Yes, I think it is pretty clear——

Mr. **Kastenmeier**. That is up to the enactment of last year's cable deregulation.

Mr. **Brown**. No, I think under the 1976 copyright law, there is a clear exemption here for home Earth station owners. That does not prevent other technology from impeding the viewing of signals, and we saw it today, the scrambling of satellite signals.

Scrambling is the mechanism by which the programmer can extract the payment, and just as we have testified that we can't stop the Earth station technology, we probably can't stop scrambling.

I think we would like to slow it down a little bit so it is not a chaotic transition.

There is the question of access, which I think is a public policy issue, whether we ought to have continued access to this programming, and is access denied by unfair pricing. One, of course, can say, you can watch it, and charge $100 a month for each signal, and then we have access denied. That is basically what H.R. 1840 is about.

Mr. **Kastenmeier**. Given this tremendous laundry list of available signals on the satellites currently, what is your judgment about the number of these signals and importance of these signals, with reference to encryption in the next several years?

Mr. **Brown**. The signals that clearly will be encrypted first are the movie channels, Home Box Office, premium movies, Showtime, Movie Channel, Cinemax, those will go first. Those commonly, as you know, charge on a subscription basis by the cable operator.

The next order of encryption perhaps might be Cable News Network, which says it intends to encrypt in June, and we just learned through an announcement yesterday in the trade press, that WOR's carrier (WOR being a superstation) Eastern Microwave, is going to scramble early next year, I believe it is in January.

This raises questions in my mind which we have not yet had the chance to analyze, as to what the effect of WOR's scrambling is on the compulsory license and the exemption that the carrier traditionally has.

Obviously, if it is the carrier that is scrambling, they are altering the signal, and under my view, there may be some significant problems under copyright law with them doing that. Without a change in that law, I think they probably would be prohibited from doing that, so I do question whether it is fair and legal under the law for them to do that.

There is a question that perhaps this subcommittee may look at in the future.

ESPN is another one that has announced that it was intending to scramble its signal in the near future. Our position is that each programmer ought to make its own decision. Many of these are advertiser-supported programs, i.e. religious, coverage of the Congress, and many of these have no desire to scramble, no motivation to scramble.

We believe those that choose to scramble because they are subscription in nature ought to have that right, but yet, we ought to have a right of access at reasonable prices to those signals.

Mr. **Kastenmeier**. How about others? How about networks? Is there any indication that they might scramble?

Mr. **Brown**. Yes, there is, Mr. Chairman. CBS announced very recently that it was going to scramble. In fact, the scrambling date that they had announced has passed, and they are currently scrambling.

Mr. **Kastenmeier**. The networks really produce free signals, and are compensated by advertising. What would be the purpose in network scrambling? To protect their feeds, is that the idea?

Mr. **Brown**. Mr. Chairman, you put me in an extremely awkward position. I am moving around in my seat trying to defend why the networks may want to scramble. In my view, these programmers—the networks, which are licensed (O&O stations) by the

Commission—have a public interest obligation to serve the widest possible audiences.

I find it hard to believe that CBS would now, after years of trying to maximize their audience, try to shrink it. I do have some idea on some of the reasons.

One of the reasons, which we can understand, is that some of the feeds going into the network, let's say their news-gathering activities, which are not yet refined, are available on satellite. We can find those if we look for them.

We can't argue against the encryption of that kind of material. But we do protest vigorously the scrambling of what goes out of the network to the local broadcasters for retransmission. We have got 1.2 out of our 1.7 million, probably, that can't receive the networks from a local affiliate.

So we think that networks ought to be required to provide that finished signal to home Earth station users. Any possible, slight, diminution in revenues to local affiliates caused by home Earth station viewing has to be so minuscule as to be not noticeable.

In fact, most people that watch satellite Earth stations have the famous AB switch, and switch off the satellite to watch their local programming, their local networks. They don't watch it on satellite.

Mr. **Kastenmeier.** With respect to the interface with cable, do you think some distinction might be made between those Earth station owners who are within the present operational limits of a cable operator and those that are not?

Is there any distinction that can be made in that connection?

Mr. **Brown.** I think there should be no distinction. I think that Earth stations serve two very useful purposes. The first useful purpose is it brings television to those that never had it. That is in the rural areas. It has done a fabulous job. I mean, we have had the promises of UHF, we have had the promises of MDS, we have had the promises of cable, we have had the promises of low power.

This technology has delivered.

Now, let's talk about inside the cable area. Last year, this Congress deregulated cable's rates. And what have they done? They have tried, through forming a consortium, through imploring the programmers to scramble and be cable-friendly, to have a monopoly in the distribution of programming.

I would like to see every American get this programming at the lowest possible cost. I think that is what the Congress ought to be looking at. And the way to do that is through competition to cable.

Congress has deregulated cable on the premise that there was competition, and I think we ought to ensure that competition. So I don't see the validity of any distinction between outside and inside of a cable franchise.

Mr. **Kastenmeier.** At this point, I would like to yield to the gentleman from Virginia, Mr. Boucher. I have some other questions later.

Mr. **Boucher.** Thank you, Mr. Chairman.

Mr. Brown, I understand from your testimony that today, there are slightly less than 2 million Earth stations in use in the United States, I believe you said 1.75 million. And of course, we did hear the testimony earlier from the Copyright Office that sometime early next year, there should be approximately 100,000 decoding devices available, to be acquired by that 1.75 million Earth station owners.

Obviously, there will not be enough decoding devices available for all of those who may choose to purchase them in the foreseeable future. And I suppose that that fact underlies your organization's support for the moratorium legislation; am I correct in that assumption?

Mr. **Brown**. Yes, it does, Congressman. The moratorium is, indeed, that. Some have painted us as being totally against scrambling, totally against payment, that we are pirates. None of that is true.

A moratorium is a resting period to make sure that all these people that are going to have to cope with an untried scrambling system that is going to radically effect them, have an adequate transition.

Your colleague, Congressman Mazzoli, asked before whether the problem of the decoder will be solved because we will have one decoder? I am not so sure it is in the interests of the American public and of our industry to have just one encoding technology.

We have a decoder that is being promised at around $400 to add on to a consumer's Earth station. But I have been told by other manufacturers, such as Oak Industries, that they would be able to provide the microelectronics, the chip sets, to the satellite receiving industry, and that other decoder manufacturers could provide these chip sets, so that we could have two or three or even four decoders built into that very receiver that you see over there at a price less than the $400 that the M/A-COM add-on set is going to be available for.

This would provide competition in the field of decoders and make sure that the price of decoders remained low.

Mr. **Boucher**. Provide us with a little basic knowledge, if you will, on how the decoders are being manufactured today? Who is doing that manufacturing? What is the anticipated method of distribution of the decoders that will be manufactured? And how would you have the process changed, both with respect to manufacturing and with respect to distribution?

Mr. **Brown**. There are several companies that have developed encoding mechanisms, including M/A-COM, Scientific Atlanta, Oak Industries, General Instruments, and others. I believe some 15 companies responded to the NCTA request for proposals on scrambling signals.

The company that would appear to have the lead in decoding right now is M/A-COM. It has received orders from The Movie Channel, Showtime, Home Box Office, Cinemax, and Cable News Network, and now WOR for decoding.

It is my understanding that M/A-COM will furnish a facility, a centralized facility, a computer to be used by all the programming services that would scramble the signal through this computer and they would then have access—the consumer would have access either through the cable operator or through their programming service, or if there were independent distribution.

My understanding is that M/A-COM intends to distribute its decoders through its normal distribution channels, which in our industry includes distributors of Earth station equipment who then redistribute to retailers, such as Mr. Haley, who then sell it to the public.

All kinds of questions, however, are raised in our minds. What happens when you take that M/A-COM, or any other decoder, attach it to that receiver and the equipment? Does it void the warranty? Who is responsible for it?

How much is it going to cost? Is it going to be made available within the receiving manufacturing industry? In other words, can we buy the chip sets from M/A-COM so we can build it in for maybe $50, or maybe $75, and not have to pay $400 for it?

These kinds of questions are the ones that make us believe that the moratorium is essential, so that they can be resolved before we have this grand experiment with 2 million, soon to be 2.5 million or 3 million people by the end of next year.

Mr. Boucher. There is a free market today, however, for both the manufacture and distribution of decoding devices, and I do not hear you suggesting that there should be something less than a free market for those processes, do I?

Mr. Brown. I suggest not. I suggest that there should be a free market. Some of the activities that have taken place to date, such as the NCTA "picking" the technology for the industry, do not smack to me of a free market.

It is my understanding that that NCTA consortium may not be with us very long, but we don't know that.

Mr. Boucher. Let me ask a couple of questions on a somewhat unrelated topic. I have observed, and I know a number of others have, the statements that are being made by some of the broadcasters utilizing satellite technology, Cable News Network, ESPN, and perhaps some others, that under the present state of the law, those who own Earth station receivers must pay a fee in order to receive legally the signal that is being broadcast by the satellite users.

I also observed in one of the local newspapers in my congressional district an advertisement that was run by one of the firms that sells the satellite receivers, and that statement was to the effect that there had been some misleading information in the statement, I believe CNN was referenced in particular.

Does your organization have a position with respect to whether the statements that are being made concerning the need to pay fees is correct or whether that is an incorrect interpretation of the law?

Mr. Brown. Yes, as you can imagine, we have a very strong position on that. We think that the announcements by ESPN and CNN are blatantly illegal, and many of the authors of the bill—Senator Goldwater, Senator Gore, Congressman Tauzin, Congressman Rose—have all made public statements on the floor and elsewhere to that effect.

The provisions in last year's bill said that encryption was a way to deal with the problem of payment or, number two, there could be a marketing plan for unscrambled signals. But it was made very clear in the legislative history and in the remarks of the authors of the bill as well, including the House report, that that had to be negotiated in the marketplace.

These fees being imposed by ESPN and CNN, which are 1,000 percent greater than they charge cable, have not been negotiated, they were announced one day on the cable television screen, and we think that they are illegal.

We have advised the Earth station industry and consumers that we don't think that they have to pay. Nobody has been sued by the programmers, because I believe they well know that it is not appropriate for them to do it.

In fact, we issued a public challenge to cable operators and others to, so to speak, put their money where their mouth is, and challenge somebody on it. But they have refused to do that.

So it is a case of harassment of the satellite Earth station industry. I think that many of the retailers all over the United States are kind of incensed by ESPN and CNN doing that because it does deter sales of Earth stations.

We think that the reason it is being done, and I think if you had testimony from ESPN and CNN, you would find out that they are indeed attempting to be cable-friendly, and they have been pressured to do just that kind of thing.

Mr. **Boucher**. Well, you say that the producers and broadcasters of the programs have not taken court action against receivers who fail to pay the fee. How about the other side of the coin?

Have the firms that sell these devices or individuals who receive the signals instituted any kind of action by way of a declaratory judgment or perhaps seeking an injunction to prevent the broadcast of the statement?

Mr. **Brown**. No, we have not done that. We have been focusing, thus far, on the primary issue of scrambling. As you know, the Justice Department is investigating this issue. We have been dealing with trying to receive a congressional resolution of the issue.

And that issue, of the advertising, is a sideshow compared to these more important and delicate matters. We could bring such an action, but we have been hesitant to do so. We have hoped that we could reason with CNN and ESPN to stop these advertisements.

I have recently requested of them to do so in a letter that just went out, and failing their compliance there, we may be forced into bringing legal action.

One of the reasons that we didn't, we thought that our advertising campaign and the word of mouth that you didn't have to pay would be sufficient. We didn't think it was that critical of an issue. I was certainly wrong on that score.

The Earth station industry is very upset. It didn't go away, and consumers in cable areas who were thinking about buying Earth stations aren't doing it, because of that kind of advertising.

So we may have to take the more strenuous route.

Mr. **Boucher**. I would appreciate your submitting, if you could, a written statement that contains your legal arguments as to why the statements being broadcast are misinterpreting that state of the law.

I would find that interesting, and if you could do that, it would be appreciated.

Mr. **Brown**. I would be more than happy to do that.

[The information follows:]

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April 4, 1986

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties, and the Administration of Justice
Committee on the Judiciary United States
House of Representatives
Washington, D.C. 20515
Attn: Mike Remington, Chief Counsel

Dear Representative Kastenmeier:

During my recent testimony before your committee, Representative Boucher asked us to provide further information to support our position that Section 705(b) of the Communications Act specifically authorizes the owners of home satellite earth stations to continue viewing the unencrypted signals of satellite cable programmers without complying with terms and conditions unilaterally imposed, without any attempt at negotiation, by satellite programmers.

By way of general background, Section 705(b) of the Act creates a "safe harbor" immunizing individuals from potential liability under Section 705(a) if their activity is limited to the interception or reception and private viewing of "satellite cable programming." By its own terms, the safe harbor is not available to individuals unless: (1) the programming is not encrypted (§705(b)(1)); and (2) a "marketing system" for authorizing private viewing by individuals has not been established (§705(b)(2)). If the programming is encrypted, or if a "marketing system" is established, the safe harbor of Section 705(b) does not apply and interceptions and divulgences, or receipts and uses, of such programming are subject to the uncertain application of Section 705(a).

Although Section 705(c) defines the terms "satellite cable programming," and "encrypt," the term "marketing system" is not defined anywhere in the Act or anywhere in the Communications Act in general. Nor does the term have a commonly accepted meaning in the communications industry.

As you know, the primary rule of construction of statutes is to ascertain the intention of the legislature and carry that intention into effect to the fullest degree possible. United States v. Cooper Corp., 312 U.S. 600 (1940); United States v. American Trucking Associations, 310 U.S. 534 (1940).

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The starting point for interpreting a statute is the language of the statute itself. If the language or meaning of a statute is "clear and unambiguous," that language must ordinarily be regarded as conclusive, and courts are bound to give effect to the statute's literal meaning. Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980); United States v. Turkette, 452 U.S. 576 (1981); Albernaz v. United States, 450 U.S. 333 (1981).

If the terms of a statute are unclear, however, courts can, and do, resort to extrinsic aids to ascertain the legislature's intent in enacting it. Thetford v. United States, 404 F.2d 301 (10th Cir. 1968). A primary extrinsic aid is the legislative history of the statute itself. Tahoe Regional Planning Agency v. McKay, 769 F.2d 534 (9th Cir. 1985). See gen., 2A Singer, Sutherland on Statutory Construction, §48.01, et seq. (4th ed. 1984).

It is generally accepted that statements made by any members during debate may be considered where they show a common agreement in the legislature about the meaning of an ambiguous provision. Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980). See 2A Singer, Sutherland on Statutory Construction, supra at §48.13.

Statements made by members of a legislative committee responsible for preparation and/or introduction of legislation have been given more weight than legislative statements generally. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Wright v. Vinton Mountain Trust Bank, 300 U.S. 440 (1937). The Supreme Court has stated, as a basic rule of statutory interpretation, that statements of a sponsor of legislation are "pregnant with significance." National Woodwork Manufacturers Association v. NLRB, 368 U.S. 612, 640 (1968), quoting NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964). See 2A Singer, Sutherland on Statutory Construction, supra at §48.15.

The Committee Report accompanying H.R. 4103, the House version of the legislation, specifies that a "marketing system" must be the product of marketplace negotiation:

> Specifically, subsection (b) states that the provisions of subsection (a) shall not apply to the interception or receipt of programming if . . . a program exists under which an agent . . . has been appointed for the purpose of authorizing private viewing . . . and such authorization is made available pursuant to a marketplace negotiation.

130 Cong. Rec. H. 10439 (Oct. 1, 1984) (emphasis added).

Statements by principal House sponsors of the legislation reveal their agreement with this concept:

> The intention of the legislation is not to force programmers to establish a marketing program for home Earth stations but to make it clear that nothing in the legislation is meant to foreclose the establishment of a marketplace for the selling of such programming to home Earth station users *in negotiations between the parties*.

130 Cong. Rec. H. 10443 (Oct. 1, 1984) (Statement of Rep. Albert Gore, Jr. (D-Tenn.)) (emphasis added).

> I believe that programmers can *negotiate* fair arrangements should they wish to market unscrambled signals. . . . [T]he law would sanction payments *if such a plan were negotiated*. Programmers and the viewing public and manufacturers now have broad room to reach *marketplace accommodations*.

130 Cong. Rec. H. 10446 (Oct. 1, 1984) (Statement of Rep. W. J. (Billy) Tauzin (D-La.)) (emphasis added).

> I agree that the parties involved should be allowed to *negotiate in the marketplace* to establish a "marketing system" for unencrypted programs delivered by satellite. . . . My understanding is that any marketing plan must be *negotiated in good faith* and realistically designed to facilitate authorized viewing.

130 Cong. Rec. H. 10446 (Oct. 1, 1984) (Statement of Rep. Charles Rose) (D-N.C.)) (emphasis added).

The chief sponsor and principal drafter of Section 705(b), Senator Barry Goldwater (R. Ariz.), also discussed the concept of the "marketing system," stating:

> It should be emphasized that the intention of section 705 is that if there is a marketing plan for unencrypted signals, it will be the result of good faith marketplace *negotiation* for the programming. *The plan cannot be unilaterally imposed.*

130 Cong. Rec. S. 14284 (Oct. 11, 1984) (emphasis added).

No extrinsic evidence can be found, in the record or elsewhere, to conflict with the consensus of the legislation's sponsors, and of the members of the committee that reported out the legislation, that, whatever a "marketing system" is, it must be "negotiated" in good faith. Black's Law Dictionary (4th ed. 1951) defines "negotiation" as "[t]he deliberation, discussion, or conference upon the terms of a proposed agreement."

Thus, it seems evident that, if asked to discern the meaning of the term "marketing system," a court would conclude that such a system would have to be the product of good faith negotiations by or on behalf of the parties that would be subject to it. A unilateral attempt by a satellite programmer to impose terms and conditions upon the receipt of its signal would, quite simply, not constitute a "marketing system" under the Act, and the right of home earth station owners to view the signal under the protection of Section 705(b) would continue unabaited.

We hope this is responsive to your inquiry. If you have further questions or need further information, please do not hesitate to contact us.

Sincerely,

Richard L. Brown

RLB:cmm

Mr. **Boucher**. Let me ask you one additional question.

H.R. 1840, which I understand your industry supports, indeed, probably had substantial hand in drafting, would confer upon the FCC some new and broad jurisdiction to create what amounts to a compulsory license for the receipt of signals by Earth station owners, and to establish prices and the terms and conditions of that receipt.

Has the FCC, in hearings, or in some other way, expressed any opinion as to whether it believes it is the appropriate forum to exercise that kind of authority?

Mr. **Brown**. To my knowledge, the FCC has not testified or released any written statements on this issue yet.

Mr. **Boucher**. Have you discussed with anyone at the FCC?

Mr. **Brown**. I have informed the chairman of the FCC about the bill, and talked to him about it. I have not asked him his views on it. It was more a matter of courtesy to let him know what was in the bill, and we have not yet had the discussion on whether the FCC would or would not support this legislation.

Mr. **Boucher**. He has expressed no opinion to you?

Mr. **Brown**. No, he has not.

Mr. **Boucher**. Thank you very much.

Thank you, Mr. Chairman.

Mr. **Kastenmeier**. On the latter point, I recall the Register of Copyrights indicated as a matter of opinion the Commission would probably not want the authority.

Mr. **Brown**. My experience is that the Commission, over the last several years, has sought to decline whatever authority has been offered it, but has sometimes had to reluctantly accept authority, for example, in pole attachments, and other areas.

I don't, incidentally, look at this necessarily as a compulsory license, and certainly not one granted by the FCC. It is a right of access granted by the Congress. If you want to look at it as communications policy or copyright policy, the question is the dissemination of educational information and entertainment materials to the American public.

The FCC's role here is merely a rate regulation procedure, which they do in pole attachments, which they do in common carrier actions, all the time. If it were inappropriate, if we got that far, in the sense of that we had to have this kind of regulation, which we may well need, it may not be that the FCC is the appropriate forum.

Our industry would welcome the forum to be the Copyright Royalty Tribunal, the FCC, the District Courts of the United States, hopefully none of those.

But I think we are, unfortunately, headed in that direction unless we get some guidance to these industries from the Congress, and I think that is what these other pieces of legislation are about.

Mr. KASTENMEIER. In terms of clarifying the position of your organization with respect to intrinsic, basic copyright liability, I gather that you accept the fact that proprietors of works that are transmitted via satellite have the capacity to limit the availability of their work through encryption and other purposes. Recognizing that, notwithstanding the fact that a person's owning Earth stations may not otherwise be liable directly for such fees, some accommodation should be made with such proprietors, on some sort of marketing basis. Is that correct?

Mr. BROWN. That is correct. We have, since 1981, and attached to my testimony is a copy of a letter that we wrote to the motion picture industry, offering compensation, even when there was an unscrambled mode and no threat of imminent scrambling.

Not all services desire to be compensated via the consumer. Some are advertising supported, others are public service, others are religious, but those that are clearly to be supported by payment does not have to be done through an encryption mechanism. I think you asked that question to the Register earlier.

It could be a tax on the sale of equipment, as is done in some European countries; it could be the creation of a pool of funds based on not only a tax on the manufacturer, but taxes on the consumer when he buys a satellite Earth station.

You cannot operate a satellite Earth station without one of these guides; it is just impossible. You can even put a tax on the sale of the guides to make funds available for the payment for unscrambled signals.

You even have in place right now a compulsory license for cable transmissions. That compulsory license could be extended for the superstations to the satellite Earth station consumer, as well.

So there are many ways to achieve compensation.

Mr. KASTENMEIER. Is it your view that cable operators shall play no role in terms of the interface that you have with proprietors of copyrighted works?

Mr. Brown. That is not our position. There is a role for the cable operator. In fact, there is a role for anybody, broadcaster, common carrier, cable operator, you and me.

All we want is the proverbial level playing field. Cable can be in this business. Cable can sell Earth stations. Cable can sell the programming to Earth station owners, inside and outside their territories, that is fine, as long as somebody else can do it as well.

We want competition out there. That would solve the problem. If Home Box Office, CNN and ESPN say, "Look, we are going to sell to other distributors, other than cable," the problem is ended.

Mr. Kastenmeier. In your statement, you charge that certain entities, among them CNN and ESPN, are seeking to impose rates upon home satellite Earth station owners for unscrambled signals up to 1,000 percent higher than they charge the cable system.

Do you have any proof of that?

Mr. Brown. Oh, yes. The announcements on your television screen, if we were to turn ESPN and CNN on now, you might likely see an announcement that it will cost you $25 to subscribe to this unscrambled signal that you can watch without subscribing, of course.

There have been rate cards for all the cable systems, and they are 10 or 12 cents per month, or $1.20 a year for watching the programming. So there is a 1,000-percent markup, with no attendant costs.

Mr. Kastenmeier. I gather, as of today, you are not convinced, or you are not optimistic about arriving at, say, mutually agreeable resolutions of differences that you may have in terms of payment and collection and so forth, for these various services.

And your position today is that you need legislation rather than, say, sort of a free market environment to resolve these problems, in terms of the owners of Earth stations?

Mr. Brown. The free marketplace isn't working, Mr. Chairman. Those that are dealing, that have said at least we will give you a right of access, are dealing only through cable operators, or themselves, and they are often the cable operators.

HBO is a sister company to ATC, the second largest cable operator. Time, Inc. owns them both. Sort of self-dealing. So they are really not dealing through anybody else but themselves.

And nobody is saying we will service this Earth station market apart from the cable industry. But what do you do in that situation? Well, the Justice Department is looking at that issue. The Justice Department in this Administration has moved rather slowly on these kinds of issues. We are quite heartened that they have decided to at least look at this industry and our problems, but we don't know how long that is going to take.

We think the Congress really needs to look at this, because we have nearly 2 million Earth station consumers out there. If we are not out of business, because of these kinds of advertisements, by Christmas, we hope to have 2 million by then.

But we really need some help, some way or another. Maybe the legislative eyebrow, the raised eyebrow would be sufficient. But so far it hasn't been. We have got two bills, the moratorium bill and access bill, and there is significant cosponsorship on both of those, but yet the wheel hasn't turned sufficiently to get these programmers to deal, and to get the cable operators to let up on the pressure.

I think we need more. I think that we may need the legislation. That legislation last year was absolutely fantastic. Sales of satellite Earth stations boomed. The gray cloud of uncertainty as to the legality of Earth stations was removed.

We went from 400,000 Earth stations to over 1 million Earth stations in 1 year. They were becoming as popular as VCR's. They are indeed a great technology to have for educational purposes, for children and others.

But the gray cloud is there. In fact, it is a black cloud now, and sales aren't what they ought to be, and people are being deprived out of fear of this exciting technology.

Mr. **Kastenmeier**. You mean this all happened in the last year, this success has gone to an aura of fear in your industry?

Mr. **Brown**. Yes. And we celebrated the anniversary of the cable bill, which had these viewing rights in it, just a couple of weeks ago, when we had Satellite Earth Station Day here. But there is great fear.

I guess there are over 70 Congressmen and women who have signed on as cosponsors of these two bills. That came about, I think, largely by consumers and retailers talking to their Congressmen about how afraid they were that this was all going to vanish, that indeed the skies are going to go black.

In fact, the carrier for WOR, which is going to be scrambled, has announced no intention whatsoever of dealing with the home Earth station market, no descramblers for home users.

So the sky is, to some extent, starting to go dark, and I don't think that our industry wants to see this, and we know that the public doesn't want to see this, and we hope the Congress can perhaps come up with creative ways to help us solve the problems. We have tried to be creative, but any other remedies that can come out of this committee or any other committee, we would welcome.

Mr. **Kastenmeier**. One last question. The last question I have has to do with anticipating technology, and that has to do with the advent of the Ku-Band. To what extent will the Ku-Band change the relationship of the parties, in terms of receiving signals?

Mr. **Brown**. I think the precedents we set here today are the same ones that will be applicable on Ku-Band. As far as our industry is concerned, Ku-Band is just another size antenna, and we welcome it.

Mr. **Kastenmeier**. Will they be part of your association or not?

Mr. **Brown**. Well, many of the antennas being manufactured today are already capable and do receive Ku-Band transmissions. This one we have here today may or may not. But our industry is prepared to receive Ku-Band transmissions, and we need to set the same precedents.

All it is, (like VHF television and UHF television) is another set of frequencies, a different size antenna. It will make the programming more readily available, because as the antenna shrinks in size, you can get into more urban areas.

But I think that we need to be looking at the technology now, and that Congress ought to be aware that it is the same thing as the C-Band technology that we are operating in now. Another frequency, but not a new technology, and not a different course of programming availability. The same precedents really ought to apply.

Mr. **Kastenmeier**. Well, do you consider the Ku-Band antennas part of your trade association—do you consider them an Earth station, or do you consider them an antenna outside of your Earth station trade association?

Mr. **Brown**. We consider them within what our trade association, which is manufacturers, distributors, and dealers of satellite Earth stations, and those are exactly what the Ku-Band antennas are. We find no functional or other difference.

Mr. **Kastenmeier**. Thank you.

Well, I appreciate your testimony today. It raises very provocative thoughts in terms of the number of issues presented. What you have said is important to this committee and to the copyright law. It may also obviously relate to communications policy.

There are many others who are not testifying today who have an interest in this matter, but I think you have raised a series of issues which ought to be responded to, and this committee is indebted to you.

Thank you very much.

Mr. **Brown**. Thank you, Mr. Chairman, and members of the committee.

Mr. **Kastenmeier**. This concludes today's hearing. We thank our witnesses. Doubtless we will have a subsequent hearing on the subject at some point in the future.

The committee stands adjourned.

[Whereupon, at 12:40 p.m., the subcommittee was adjourned.]

COPYRIGHT AND NEW TECHNOLOGIES

THURSDAY, AUGUST 7, 1986

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Mazzoli, Synar, Berman, Boucher, Moorhead, DeWine, Coble.

Staff present: Michael Remington, chief counsel; Deborah Leavy, counsel; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. **Kastenmeier**. The committee will come to order.

The gentleman from California.

Mr. **Moorhead**. I ask unanimous consent that the subcommittee permit the meeting today to be covered in whole or in part by television, broadcast, radio broadcast, and/or still photography, pursuant to rule 5 of the Committee Rules.

Mr. **Kastenmeier**. Without objection that, and even satellite transmission will be covered, if possible.

Today, the subcommittee is holding a second day of hearings on the subject of copyright and new communications technologies. The initial day was last November when we received testimony from the Register of Copyrights, Mr. Ralph Oman; the Earth station industry, represented by Mr. Rick Brown, and the low-power television industry, Mr. Richard Hutcheson.

In perceptive and concise testimony, both Mr. Oman and Mr. Brown identified a significant problem affecting satellite retransmissions of copyrighted signals to Earth station owners. The licensing of descrambling devices and the subsequent sale of descrambled signals to Earth station owners by common carriers falls outside the purview of the copyright exemption granted by statute by passive carriers for secondary transmissions of copyrighted works, particularly when the carrier itself scrambles the signal.

The problem, put in simple terms, is that scrambled superstation signals cannot under current copyright law be sold to Earth station owners without the consent of the copyright owner of the underlying programming.

This morning we will analyze a proposed solution to that problem, H.R. 5126, the Satellite Home Viewer Act of 1986. [The text of H.R. 5126 is reprinted in appendix I.] The task of preparing the bill, which bears my name along with those of Congressman Synar, Congressman Moorhead, Congressman Boucher, and Congressman Wirth, was time consuming and difficult.

The subcommittee staff worked long and hard with representatives of the motion picture industry, the common carriers, the cable television industry, the Copyright Office, and the superstations, in arriving at a solution. That solution, as I said in my floor statement when the bill was introduced, may not be perfect. Today, I am sure that we will hear testimony about proposed refinements.

A recent OTA report entitled "Intellectual Property Rights in an Age of Elections and Information," flashes a caution light to those who would rush headlong toward legislation affecting copyright and new technologies. It is possible to proceed through the caution light and, in my opinion, the bill does that.

With these thoughts in mind, I would recognize our first witness.

Our first witness has just arrived, as a matter of fact. I would like to introduce him. Do you have an opening statement?

Mr. SYNAR. Yes.

Mr. KASTENMEIER. Before I recognize the gentleman from Oklahoma, does the gentleman from California have a statement?

Mr. MOORHEAD. Yes.

Mr. KASTENMEIER. The gentleman from California, Mr. Moorhead, is recognized for an opening statement.

Mr. MOORHEAD. Thank you, Mr. Chairman. I would like to commend you, and the gentleman from Oklahoma, Mr. Synar, for your effort in drafting this legislation and scheduling this hearing.

The problem which we seek to correct by this legislation is a technical one. Common carriers are considered passive, not by a decision of this committee in the 1976 act, but rather by a court decision interpreting the 1976 act.

This committee did not address that issue in 1976, because satellite communications was just coming into its own at that time and it was not an issue in that year. By court interpretation of that act, common carriers are precluded from changing and selling a broadcast signal. And since we are in the age of scrambling, serious problems have arisen where superstations or common carriers have decided to scramble their signals.

I am looking forward to the testimony this morning. There are questions that arise from the creation of a new compulsory license which H.R. 5126 creates.

I realize that this bill is not without opposition. Hopefully, this morning the testimony will clarify some of the problems that may face this legislation.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. I thank my colleague from California.

The gentleman from Oklahoma?

Mr. SYNAR. Thank you, Bob.

I can assure that your attention on this issue is greatly appreciated in Oklahoma, where the issue of signaling scrambling has become more important than oil prices and Oklahoma football combined.

I believe that H.R. 5126 will go a long way toward resolving the problems in the development of the Earth station industry. It should lead to the packaging of scrambled signals for sale to home dish owners and competition among distributors of scrambled programming. Both of these should result in lower prices to home dish owners.

Dish owners are concerned, rightfully, that as signals are scrambled they will no longer have access to quality television programming. Those that are sold may be too expensive, particularly after the purchase of a $400 decoder.

These concerns have been fueled by various industry practices. For example, CBS is beginning to scramble its network feet, yet has not ensured that programming is available in many rural areas. HBO is selling its signal at a rate that many consider unreasonable, and will not allow its signal to be packaged and sold through a distributor.

Backyard dishes have brought modern society into millions of rural homes, yet these families now fear that they may be foreclosed by forces beyond their control.

The legislation we are considering today gives us a chance to do something positive for the home dish industry. It is necessary to ensure access to our superstation signals, and it should provide the framework for widespread network of distributors.

I look forward to hearing the views of our witnesses today.

Mr. KASTENMEIER. I wish to compliment the gentleman from Oklahoma for his very early interest in this matter. He and I have worked together on this from its earliest moment. He plays a very special role in this.

Our first public witness this morning is an old friend and familiar face, Mr. Jack Valenti, president, and chief executive officer of the Motion Picture Association of America. He is also chairman of the Alliance of Motion Picture and Television Producers, Inc.

Jack Valenti has appeared before us on numerous occasions; he is always eloquent. He does a superb job of representing the views of the motion picture industry.

Incidentally, I should say that at least two representatives of motion pictures companies have been of enormous assistance to the subcommittee in this particular process, Tim Boggs, director of legislative affairs for Warner Communications and Mike Berman, who represents Columbia, deserve special mention for their vision and help.

And, of course, Jack, the Motion Picture Association has been of assistance; and I thank you for that.

We greet you; and you may proceed as you wish.

STATEMENT OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. VALENTI. Thank you, Mr. Chairman. On behalf of MPAA I am really glad to be able to join with you, and Congressman Synar, and the rest of this committee, and embracing the concept of this bill.

I want to tell you that we came to this conclusion, though, for two basic reasons. First is that we want to be cooperative with this committee, to demonstrate, I think, visibly and markedly, that we can all work together in the pursuit of fair shaped and reasonable goals; I think that is important.

Our basic belief is that all programs ought to be available to all customers, and all markets, everywhere in this country. I see this bill as a beckoning toward dealing and solving these issues in a marketplace environment, rather than dealing in illusions that often times are disguised as solutions; so that is one reason.

The second reason is that we hold steadfastly to the belief that the cable industry, an unregulated monopoly, has been granted a privileged position in the marketplace. Therefore, any new competitive force that can compete robustly with the cable industry, I think, adds vitality to a landscape that is dominated by dominate MSO; therefore, the TVRO industry, and TVRO owners, in our judgment, are a competitive force. I think they need to be nourished and they need to be hospitably received in this country.

I want to offer respectfully one modest caution. I hope that this committee will resist intervening in the bill to solve other problems that may be quite real but not relevant to what this bill wants to do. A consensus, I think, has been formed, to deal narrowly with the objectives of this bill. I applaud that, and I support it. I can warrant you that MPAA has got a lot of other problems, but I don't think this is the arena in which to deal with them.

One thing I would like to say is that the marketplace, in our judgment, has a resiliency which allows it to confront any need that TVRO owners and would-be owners have, save in one respect, and that is the availability of scrambled superstation signals. A cable system can receive these signals. TVRO owners cannot.

That is an unfair advantage, and it springs from the unfair compulsory license. So what your bill, Mr. Chairman, and Congressman Synar's, does, it unbuckles the binding of that was caused by section 111 of the Copyright Act, and it would instantly allow TVRO owners to recall five superstations if they choose.

I can't find any suitable reason, for cable systems' ability to receive what TVRO owners cannot. That is the basic reason why we support this bill.

Now, one thing it does, it provides copyright owners with a protective garment, which I think we rightfully deserve, including a flat fee of 12 cents per signal, per subscriber, as well as the sunset of the compulsory license in this particular case, which I think is going to give birth to incentives to move as swiftly as possible for a negotiated fee for superstation signals for TVRO owners. This protective cloak ought not be removed.

There are some elements that have been left unaddressed, and I think, Mr. Chairman, thanks to you and your very able staff, they recognize that there are some things that need to be handled; I think that we should be moving with dispatch to find some reasonable way to deal with them.

First, there ought to be a reasonable limit, that reasonable people can agree on, on the number of superstations which are eligible for this license. I have to tell you that I think that unlimited superstation carriage could really ravage the health of television programs delivered to TV stations and the local community.

Second, the bill has to be limited only to private TVRO owners.

Third, we think the bill ought to be restricted to the current C-band technology. Whatever soars beyond that band is a new marketplace, that has either never been explored, or tended or mapped.

I think that is why we ought to deal with C-band and leave the KU-band, or any other new band that may come to the fore, leave that as unmapped terrain that we would get to at a later time.

Fourth, I think the rules given the Copyright Office to fulfill and administer, perhaps, ought to be restudied. There is little question, I believe, but what these responsibilities could be carried forth with the same dispatch and at much less cost than they are now in the bill, and could be done with less cost with other means.

So I want to offer our counsel and whatever help we can give this committee, and the minor revisions, which are now, I think, requisite to a really, Mr. Chairman, a durable piece of legislation that I think will enlarge the potential for TVRO owners, and I think of benefit to all segments of the marketplace, and to the country.

I thank you.

[The statement of Jack Valenti follows:]

SUMMARY

STATEMENT OF JACK VALENTI, PRESIDENT OF MPAA, ON H.R. 5126, BEFORE THE COURTS, CIVIL LIBERTIES, AND ADMINISTRATION OF JUSTICE SUBCOMMITTEE

August 7, 1986

The Motion Picture Association supports the general concepts embodied in H.R. 5126. MPAA shares with Congress a commitment to the growth and development of a healthy, competitive TVRO marketplace. We welcome new competitors and new markets.

The marketplace is capable of responding immediately to the needs of TVRO owners and would-be owners in all respects save one - - the availability of scrambled superstation signals. Today, cable systems can receive scrambled "superstations", but TVROs cannot. This unfair advantage held by cable stems from cable's compulsory license. H.R. 5126 would eliminate this discrimnatory effect of Section 111 of the Copyright Act and ensure that "superstation" signals are available to TVRO owners.

MPAA has always been, and will always remain, opposed to the cable compulsory license. It represents an unwarranted intrusion in the free marketplace for television programming. Even so, it is not fair for Congress to mandate that a mature cable industry can have access to satellite-delivered "superstation" signals while access is denied a fledgling TVRO industry seeking to compete with cable. We believe that satellite-delivered "superstations" should be enjoyed by TVRO owners under the same statutory dispensation granted to cable viewers.

This legislation provides a useful framework for Congressional action to address this important issue in a fair and effective manner. It incorporates important protections for copyright owners, including a statutory flat fee of 12 cents per signal per subscriber; a sunset of the compulsory license; and an incentive to move as rapidly as possible to a negotiated fee for the use of signals by TVRO owners. These protections must not be compromised.

We urge several important modifications of this useful legislative proposal: (1) there must be a reasonable cap on the number of superstations eligible for the temporary compulsory license, (2) the bill must be limited only to private TVRO owners, (3) it must be limited to the current C-band satellite technology, and (4) the myriad roles given the Copyright Office in administering the temporary compulsory license must be reevaluated.

With these modifications, we believe that the timely passage of H.R. 5126 would serve the public interest.

TESTIMONY OF

JACK VALENTI

PRESIDENT

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

ON H.R. 5126

BEFORE THE HOUSE SUBCOMMITTEE ON COURTS, CIVIL
LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

August 7, 1986

Mr. Chairman, and Members of the Subcommittee:

My name is Jack Valenti.

I am President and Chief Executive Officer of the Motion Picture Association of America, Inc. (MPAA). MPAA's members are among the leading producers and distributors of motion pictures and television programs in the United States.

The member companies of MPAA are:

Columbia Pictures Industries, Inc.

The Walt Disney Company

De Laurentiis Entertainment Group, Inc.

MGM Entertainment Co.

Orion Pictures Corporation

Paramount Pictures Corporation

Twentieth Century Fox Film Corporation

United Artists Corporation

Universal City Studios, Inc.

Warner Bros. Inc.

MPAA supports the general concepts built into this legislation.

We congratulate the Chairman, Mr. Kastenmeier, Mr. Synar, Mr. Boucher, Mr. Moorhead and the chairman of the House Telecommunications Subcommittee for the innovative construction of this bill. Your work is a fresh look at a knotty problem, and by any gauge can be described as an excellent starting point for resolving cloudy issues.

You have, Mr. Chairman, clearly recognized in your introductory statement to H.R. 5126 the essential critical points to be examined before the legislation would be ripe for subcommittee consideration.

MPAA is anxious about a few elements in the bill, and if these concerns can be challenged, weighed and handled with dispatch, MPAA will, without hesitation, commit its support to the passage of this measure.

MPAA shares with the Congress a commitment to the growth and development of a healthy, competitive TVRO marketplace. The more competitive media there are to deliver copyrighted works to consumers, the broader the market opportunities for producers of these works.

The "scrambling" of satellite-delivered program services is requisite to the development of a genuine TVRO marketplace. Scrambling protects the integrity of the signal. A marketing scheme that permits TVRO owners to "unscramble" signals in exchange for a market-based payment provides the nexus between the interest of the consumer in receiving programming and the right of the producer to compensation.

The TVRO marketplace is at a comparatively infant stage in its development. Yet we see this marketplace brimming with potential.

It is characterized by (1) continuing innovations and price reductions by consumer equipment manufacturers, and (2) growing competition between and among program service providers.

At this time, and without the need for Congressional action, the TVRO marketplace appears more than capable of responding swiftly to the needs of current and would-be TVRO owners in all respects save one -- the availability of scrambled "superstation"[1] signals. H.R. 5126 provides a means to address this problem.

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[1] In everyday terms, "superstation" applies to the five television broadcast stations -- WTBS (Atlanta), WOR (New York), WPIX (New York), WGN (Chicago), and KTVT (Dallas), distributed nationwide via satellite by "common carriers" for retransmission by cable television systems. Under Section 111 of the Copyright Act, cable television systems may retransmit these signals for a modest compulsory license royalty fee. There is no provision in the Act that would permit distribution of these signals to TVRO owners under the same compulsory license structure. It is this disparity between what is available to cable subscribers under a compulsory license and what is available to TVRO owners that H.R. 5126 is designed to remedy.

H.R. 5126 Provides a Useful Framework for Congressional Action

Consider the unique circumstances that require consideration of H.R. 5126.

Cable television today enjoys an unfair advantage in the marketplace. The Federal government has granted cable television system operators a "compulsory license" that permits them to intercept any over-the-air television broadcast signal and retransmit it to their subscribers. Most importantly, it permits cable systems to retransmit so-called "distant signals" -- often so far distant that they are channeled to the cable system's headend by microwave or satellite links -- and to do so in exchange for a Federally-mandated royalty payment.

A large and lucrative business has grown up around the demand among cable system operators for these distant signals, particularly the so-called "superstation" signals. This demand is based on the below market rates cable systems pay for distant signal programming under the compulsory license. Satellite carriers such as United Video, Tempo (Southern Satellite Systems) and Eastern Microwave have selected which "superstation" signals they will carry, and have aggressively marketed these signals to cable systems for retransmission to their subscribers.

These satellite carriers charge "carriage fees," generally based upon subscriber counts, to those cable operators electing to retransmit the "superstations". The cable operator, availing itself of the "compulsory license" in Section 111 of the Copyright Act, then remits to the Copyright Office royalty fees established by the Congress or the Copyright Royalty Tribunal (CRT) for those retransmission rights. The satellite carriers pay nothing to program owners under a fictional legal concept that they are "passive carriers."

MPAA has always been, and will always remain, opposed to the cable compulsory license. It represents an unwarranted intrusion in the free marketplace for television programming. It constitutes a taking from copyright owners for the benefit of a mature and lucrative industry -- cable television -- that has proven itself perfectly capable of obtaining large quantities of diverse programming in the free market. Any historical justification that may have existed for the cable compulsory license -- i.e., the need to nurture a fledgling cable industry -- has long since expired.

However, if we must continue to live under that regimen for the near future, it would not be fair for the law to mandate that a mature cable industry can have access to satellite-delivered "superstation" signals while access is denied to a fledgling TVRO industry seeking to compete with cable.

Current interpretations of the terms of the Copyright Act indicate, however, that the cable compulsory license in Section 111 cannot be extended to permit the scrambling and marketing of "superstation" signals to TVRO owners by the satellite carriers or their elected subdistributors.

Inasmuch as the disparity between the rights of cable operators and TVRO owners is, in this instance, the result of government action, it is appropriate for government to act to eliminate the disparity.

Therefore, the goal of H.R. 5126 should be specifically, explicitly limited to ensuring that the special statutory dispensation granted cable operators to carry (and cable subscribers to view) satellite-delivered "superstations" will also be enjoyed by TVRO owners.

H.R. 5126 does mandate a temporary, short-term statutory "taking" of the property rights of copyright owners. That is not desirable, but under the circumstances before us it may be unavoidable.

While mandating this "taking," H.R. 5126 also provides several important protections for the interests of copyright owners. These protections must not be compromised, in order that some balance of the equities may be maintained.

These protections include:

1. The requirement that satellite carriers of "superstations" remit a statutory flat fee to a Federal fund for distribution to copyright owners. The decision to fix in statute a flat fee of twelve cents per superstation signal per subscriber per month for retransmission rights serves the interest of all parties in administrative economy and simplicity.

This fee is equal to the average fee paid by cable systems per subscriber, per distant signal. Any erosion of this fee would provide TVRO owners an unfair advantage and would place an unconscionable burden on program owners.

There is no provision for an escalator or other means to modify the statutory fee prior to the later negotiation or arbitration of a marketplace rate for carriage required by the bill. Therefore, fairness to the interests of copyright owners necessitates that Congress hold fast to the negotiation/ arbitration schedule in the bill.

2. The mandatory sunset of the temporary compulsory license system in 1994. H.R. 5126 recognizes that the compulsory license is needed only to bridge the gap for a short period of time until the TVRO industry becomes a full-fledged player in the marketplace. By placing a limit on the term of the license, Congress makes a strong statement of its faith in the ability of the marketplace to deliver to TVRO owners a profusion of copyrighted works at reasonable cost. The sunset period should therefore be no longer than that currently incorporated in the bill.

3. The incentive to move as rapidly as possible to a negotiated license fee. While the temporary compulsory license must itself be created by the Congress, this bill recognizes that the Federal government should not be interposed in the rate- setting business any longer than absolutely necessary. H.R. 5126 requires that copyright owners and satellite carriers of superstations begin negotiations over carriage rates by a date certain, or submit to arbitration over rates.

This legislative incentive to move closer to a marketplace model for "superstation" delivery to TVRO owners should not be weakened. Indeed, the bill should clearly encourage voluntary agreements between copyright owners and satellite carriers to be concluded and take effect at the earliest possible date.

There Must Be Strict Limitations on the Temporary Compulsory License

With the basic framework of H.R. 5126 in place, it becomes appropriate to consider certain modifications.

Several of the original sponsors suggested in their statements upon introduction of the bill that key issues remained to be explored.

We offer our thoughts on several of these issues which are critical to a fair resolution of the problem.

1. A "cap" on "superstations" eligible for the temporary compulsory license. H.R. 5126 should be curative legislation, intended only to remedy a present day imbalance -- an inadvertent result of prior government action -- between the rights of TVRO owners and cable operators.

There are a limited number of "superstations" in existence today, presumably because those now in existence satisfy current demand from cable operators.

However, in the absence of a clear limit on the number of superstations eligible for the temporary compulsory license for TVRO distribution, the potential for abuse is horrifying.

A large universe of TVRO owners could stimulate the creation of additional "superstations" which would be distributed under the compulsory license in lieu of non-broadcast program services which involve marketplace negotiations. Thus, absent a "cap" on the number of "superstations" covered, H.R. 5126 could seriously exacerbate the unfairness of the compulsory licensing system rather than provide TVRO owners "parity" with cable subscribers during a reasonable transition period.

The interests of many would be harmed by such a development. Copyright owners would suffer a further dilution in the value of their works. Independent television stations would face unfair competition. Potential new program services that may be created exclusively or primarily for the TVRO marketplace would be pre-empted.

The purpose of H.R. 5126 should be to ensure that cable subscribers and TVRO owners are treated equitably, with neither unduly benefitted as against the other. This means that the availability of "superstation" signals to TVRO owners should parallel their availability to cable subscribers.

Logically, TVRO owners ought to be limited to the same number of "superstations" that cable operators may distribute under the low, statutory compulsory license rates. We recognize, however, that this requirement would be impossible to administer.

We suggest that the temporary compulsory license be limited to carriage of all current satellite-delivered "superstations" (i.e., WOR, WTBS, WGN, WPIX and KTVT), and that the license be extended ONLY to those additional "superstations" that may come to be carried by cable systems serving 20 percent or more of all cable subscribers nationwide.

This would ensure that TVRO owners would have access to all the "superstations" available to cable subscribers today. In fact, few if any cable subscribers today have access to all of these signals because cable operators typically choose to carry only one or two "superstations".

At the same time, it will help maintain the equity between cable and TVROs during the temporary compulsory license, should cable systems choose to expand their "superstation" carriage at the rates established by the Congress and revised by the CRT.

2. Limiting the availability of the temporary compulsory license to the provision of "superstations" to individual TVRO owners. The stated purpose of H.R. 5126 is to facilitate receipt of "superstations" "for private viewing by earth station owners" (emphasis added). Yet the language of the bill seems to permit operators of satellite master antenna television (SMATV) systems -- and possibly others -- to take advantage of the temporary compulsory license.

SMATV systems are operated by the owners or managers of apartment and condominium complexes on a commercial basis as a service to their tenants. SMATV operators currently avail themselves of the compulsory license offered to cable television operators under Section 111 of the Copyright Act, and are subject to all relevant terms and conditions. Therefore, it is unnecessary to extend the temporary compulsory license in H.R. 5126 to SMATV.

There is a related problem. The definition of "private viewing" in H.R. 5126 is so broad as to conceivably encompass every delivery medium known to man. It should be clarified that the intended beneficiaries of the temporary compulsory license are individual households that own or lease their own TVRO dishes and receiving equipment. The invocation of the temporary compulsory license for the purposes of serving multiple dwelling units should be prohibited -- the Section 111 compulsory license is available for that purpose.

It should also be clarified that cable system operators may avail themselves of the temporary compulsory license in this bill solely for the purpose of marketing "superstations" to individual TVRO households as described above. To the extent that cable operators provide "superstation" signals to cable subscribers, operators should be limited to their current compulsory license under Section 111.

3. Limiting the temporary compulsory license to current C-band satellite technology. There should be no presumptive compulsory license for any new medium. The need for the temporary compulsory license granted by H.R. 5126 is the result of a unique set of circumstances. C-band satellite technology was originally intended to be a "wholesale" distribution mechanism. By dint of deregulation and marketplace phenomena, C-band has now become a "retail" medium. Hundreds of thousands of consumers have invested in C-band equipment, and a new niche in the video marketplace has been created.

It is conceivable that Ku-band or other new distribution technologies could emerge in the foreseeable future. Any copyright issues that may be faced by these new technologies should always be subject to marketplace solution first, and should require government intervention only as a last resort. In the event the government chooses to get involved, it should review each case on its own merits.

Therefore, the legislation should be explicitly limited to today's immature C-band market. The C-band situation is sui generis, and should be treated as such.

4. Clarifying the role and authority of the Copyright Office in administering the temporary compulsory license. H.R. 5126 would repose in the office of the Register of Copyrights a wide range of responsibilities. The Register would:

-- designate negotiators for the parties to voluntary licensing agreements if they are unable to find them on their own;

-- designate the arbitrators to set an arbitered rate if negotiations fail;

-- decide whether the arbitrators have reached a reasonable outcome;

-- exercise his discretion to set aside the arbitrators' outcome, if not adequately substantiated, and impose another rate;

-- determine how the satellite carriers are to account for TVRO households served, and whether they have done so properly;

-- determine whether a controversy exists in the distribution of royalties; and

-- decide who is entitled to share in these royalties.

It seems that the Register acts as judge, jury, executioner, and a few other things under H.R. 5126. While I have every confidence that the current Register would perform with Solomon-like wisdom, this may raise serious questions about the Constitutionality of the measure from a separation of powers perspective.

There is another important practical consideration. The Register has no direct experience in the distribution of compulsory license royalties, or the tools in place to accomplish distributions. The Copyright Royalty Tribunal (CRT) has both the experience and the tools.

Requiring the Register to duplicate the CRT's distribution capabilities could be very costly and cumbersome. Because costs of management and distribution of the royalties must be borne by copyright owners, it is probable that the additional costs incurred by the Register would quickly deplete the very modest royalty pool this bill will generate.

For these reasons, we submit that the role of the Register in H.R. 5126 should be reconsidered.

* * *

Mr. Chairman, the four issues I have just outlined warrant close scrutiny by this Subcommittee. I also ask the opportunity to submit for the record a number of other, more technical suggestions for the Subcommittee's review.

Opposition by Some in the Cable Industry Should Be Dismissed

We understand that some elements of the cable television industry have raised various objections to H.R. 5126. We find no merit in those objections we have heard to this point, and we encourage Congress to dismiss them.

Those parties whose interests are most directly affected in the temporary compulsory license here created are attempting to achieve consensus on statutory terms and conditions. The cable industry has no standing to challenge such an agreement. Cable's apparent distaste for a compulsory license system that more nearly approximates the free marketplace than their own privileged status should not impede the efforts of those who wish to construct such an accommodation.

Cable operators should not be able to preclude others from distributing "superstation" signals to consumers. Cable should be just another competitive medium, alongside TVROs, MMDS, and all the rest. Cable has no unique claim of right to "superstation" signals.

Cable and TVROs should be full-fledged, head-to-head competitors in the delivery of all programming services. And both cable operators and other third-party distributors should compete head-to-head in the delivery of all program services, including "superstations", to TVRO owners.

Fundamentally, we believe it is important not to increase the governmentally-conferred advantage cable already enjoys by denying the same advantage to its fledgling competitor. We think it better to improve competition to cable (through the temporary compulsory license) on the road to total abolition of all forms of the compulsory license, than to allow cable to continue to use its compulsory license as an additional barrier to competition.

The cable television industry won deregulation from Congress on the premise that it is subject to real marketplace competition. Therefore, let cable go forth and compete fully, fairly and freely with the TVRO industry. I believe there is ample room for both competitors, and for many more.

Timely Passage of H.R. 5126, With Modifications, Would Serve the Public Interest

The circumstances Congress wishes to address through H.R. 5126 are unique.

The response reflected in H.R. 5126 is creative and holds great promise.

This bill reasserts Congressional faith in the marketplace to serve the needs of viewers. It eliminates an unforeseen government-created impediment to the marketing of a specific class of government-sanctioned service -- the satellite-delivered superstation -- by permitting a conditional, temporary compulsory license for a brief transitional period fixed in statute.

The bill narrowly addresses a special set of circumstances. It provides no precedent for any other form of government intervention in the TVRO marketplace, nor should it. It provides no basis for the extension of the compulsory license concept to other program services or other media, nor should it.

While the bill as introduced provides a solid framework, it is critical that several key copyright protections be addressed prior to Subcommittee action. These modifications, which I have outlined above, are fully consistent with the manifest intent of the original sponsors of H.R. 5126.

As program suppliers, MPAA's member companies can well appreciate the concerns of other copyright holders in television programs carried by "superstations", such as the professional sports clubs. We encourage the Subcommittee to find ways to ameliorate these additional concerns.

I am delighted by the spirit of cooperation and caution that has characterized this Subcommittee's approach to the problems addressed by H.R. 5126. MPAA is willing and anxious to work with you, Mr. Chairman and members of the subcommittee toward a bill that serves well the interests of all consumers and all copyright owners.

Mr. **Kastenmeier**. Thank you, Mr. Valenti, for that rather brief and to the point presentation.

In terms of arguing for a cap on the number of superstations eligible for the temporary compulsory license, would this apply to the first 4 years during which there is a set fee or the second 4 years which——

Mr. **Valenti**. It applies to it all.

Mr. **Kastenmeier**. Eight years?

Mr. **Valenti**. Mr. Chairman, you have five superstations out there now. TBS has about 80-percent penetration of cable subscribers; WGN has about 37; WOR has about 30; WPIX has about 12.7; and KTVT has about 1.8.

I think five stations are out there now. Obviously, there might be more if there was a demand for it, but it looks like that is the way the marketplace is determining it. And then I recommend, we have the idea that if there are more—than any superstation that would have, say, 20 percent of penetration in cable would be eligible to be carried to TVRO owners. If they have 6, 7 8, 9, 10, I really think you do unspecified damage to local television stations. I don't know where you draw this line.

But there has got to be some reasonable way to approach, where you balance the needs of the TVRO owners with the realities of the marketplace; that seems to be reasonable, and that is what we have suggested.

Mr. **Kastenmeier**. The number of superstations has, for the past 5 or 6 years, remained relatively constant. And now, of course, there may be one or two new ones that are attempting to enter the market, a few may have already successfully entered the market. There were a couple of other stations that fell off about, I don't know precisely when, perhaps, 4, 5, 6 years ago.

Do you regard the legislation itself as an incentive for additional superstations, notwithstanding some other limitation?

Mr. **Valenti**. Mr. Chairman, I have long ago discarded my halo of pre-science. I don't know what the future holds, I really don't. And that is why I am suggesting that, because as Mr. Sam Goldwyn said, forecasting is very tough, especially about the future.

I would like to suggest that because none of us perceive what is behind that veil, why don't we take this thing cautiously and carefully. We know that five superstations more than satisfy the demand right now. With 20 percent carriage in the cable industry, another one could be added. That to me, is cautionary. It allows us to go into a future about which we know so little and the on-rush of technology that is beyond any of our imaginings. I really think this seems quite reasonable to do; That is all I am suggesting.

Mr. **Kastenmeier**. Well, I congratulate you and your industry for, generally, at least, supporting the approach incorporated in this legislation. I know that often the motion picture industry has had to either pose or have very great reservations about the impact of new technology, particularly on motion pictures. It hasn't always been, I suspect, friendly in the sense of the traditional proprietorship that the motion picture industry has enjoyed.

I would like to yield to the gentleman from Oklahoma.

Mr. **Synar**. Thank you, Bob.

Jack, thank you again. Let me echo Bob's statement, we appreciate your cooperation on this. And having disagreed with you on a variety of issues in the past, it is nice to find one that we do agree on. So, it is even more pleasurable to have you this time.

Just one question. Given the recent decision in the D.C. district court on tiering, which will probably ultimately affect the 12 cent rate calculation, would you support a return to the statutorily defined mathematical formula, and if not, what kind of rate would you like to see us come up with or what formula would you like let us use?

Mr. VALENTI. I have a two-level answer, Congressman Synar. One, I have learned to my sorrow, dismay, and total frustration, that the district court decision is not the Fat Lady singing. There is a lot more to come. We have celebrated triumphs in the district court that have turned to bitter wormwood and Gall in the appeals courts and the Supreme Court. So the Fat Lady ain't sung yet.

No. 1 no, I would not support the statutory rate. Congressman Synar, what we are dealing with is one of the most peculiar perversions of all time. Mr. Ed Taylor, for example, when he comes up to testify will be able to tell you that he will be charged 12 cents, but he can charge anything that he wants to the TVRO owner.

The cable system can charge anything they want to their subscribers. The TVRO dish manufacturers can charge anything they want. Congress is not intervening in the price level in that marketplace.

What is so frustrating to us is the only element in the marketplace, total, that Congress intervenes and sets a price is the one ingredient without which Ed Taylor wouldn't have a business, there wouldn't be any cable systems and there wouldn't be any TVRO owners, and that is programs.

If you want to see a grown man cry we can continue this. But that is the singular eccentricity of this marketplace that I am just unable to understand.

There is a lot of intervening in the marketplace to set the price of what we can charge, when everybody else in that marketplace has carte blanche to charge anything. And indeed, this Congress, in H.R. 4103 emancipated cable and, says, boys the marketplace is yours, start to plunder.

But we are the ones who are cabinned, cribbed, and confined by congressional fiat. I am sorry to get passionate about it, but darn it, that is the way I feel about it. I want to make that, as one of the former leaders of the free world would say, crystal clear as to how I feel.

Mr. SYNAR. I appreciate that. You can stand up when you make that presentation.

Mr. VALENTI. That is only so you can see me, Congressman Synar.

Mr. SYNAR. Now, why don't we try to answer the question.

Since the district court has ruled, would you offer us a formula that you utilize or some direction on where you would like to see us go?

Mr. VALENTI. Yes, I think that 12 cents per signal, per subscriber is—that is what the cable industry has been paying up to now. But I don't think that the district court decision is divinely inspired.

I think that maybe Congress ought to redress this in the interest of equity and fairness. I mean, how low do you want to go—not you, Congressman Synar—but how low should this go?

It is an indispensable element in this marketplace, without the program there is nothing. And yet it is the program that is eroded, battered, shrunk, and diminished, while everybody else is grabbing the outer edge of an ascending curve, with their revenue. It doesn't make any sense.

So my answer is we would like to stay with the 12 cents per subscriber, per signal, because I think it is the least common denominator of fairness.

Mr. SYNAR. Thank you, Mr. Chairman.

Jack, as always, it is good to have you.

Mr. KASTENMEIER. The gentleman from Ohio, Mr. DeWine?

Mr. DEWINE. No questions.

Mr. KASTENMEIER. The gentleman from Virginia, Mr. Boucher, and cosponsor of the bill.

Mr. BOUCHER. Mr. Chairman, Mr. Valenti, I join the others in welcoming you here. I just have one question.

Do you have any thoughts on whether the copyright royalty tribunal or the copyright office would be a better instrumentality to handle the distribution functions that this bill contemplates?

Mr. VALENTI. I think the copyright royalty tribunal would probably the most effective because they are now doing it. You don't have to re-invent the wheel; you don't have to go through all of the enormous kind of start up costs that could eat away at the paltry amount of royalties. The 12 cents, Congressman Boucher, per signal, per subscriber, if everybody in America, who had a TVRO subscribed, it is about a $0.25 million that you are talking about. So, you are not talking about a lot of money.

If you start up an operation with a new agency that hasn't dealt with this rather complex distribution mechanism, you might find that it would cost a lot more than the revenues provided by the superstation to actually handle the mechanism. The CRT has had a lot of experience, 5, 6, 7 years, and they could do, I think, with more dispatch and less cost.

Mr. BOUCHER. Thank you very much, I appreciate your testimony.

Mr. KASTENMEIER. Well, thank you Jack, for your appearance again this morning. It is always a delight to have you.

Mr. VALENTI. Thank you.

Mr. KASTENMEIER. Now, I would like to call forward Mr. Edward L. Taylor, chairman, president, and chief executive officer of Tempo Enterprises, Inc., which is a parent company of a number of operating communications companies, including Southern Satellite Systems, Inc. At the subcommittee's request, Mr. Taylor is appearing in behalf of the three of the largest, I guess, of the common carriers, Southern Satellite, United Video, Inc., and Eastern Microwave, Inc.

Mr. Taylor is well known to the subcommittee and is one of this Nation's leading experts on communications technologies and copyright.

Mr. Taylor, we have your written statement. You may proceed, sir, any way you wish.

STATEMENT OF EDWARD L. TAYLOR, PRESIDENT AND CHIEF EXECUTIVE OFFICER, TEMPO ENTERPRISES, INC.; ON BEHALF OF SOUTHERN SATELLITE SYSTEMS INC., UNITED VIDEO, INC., AND EASTERN MICROWAVE, INC.

Mr. TAYLOR. Thank you, Mr. Chairman, and Congressmen, for having me here today. I think you have done a great job on H.R. 5126, and I am here today to support you and congratulate you on what you have done.

Unlike the other witnesses who represent an association, the three common carriers that I am trying to represent here today are fairly hefty competitors in the marketplace and as competitors, it is hard for us to agree.

The other two did agree with the written testimony that is in front of you all. They don't have the opportunity to second-guess my summary of what we think. And they won't have the opportunity to answer your questions.

So at some time or another I may try to tell you some of us feel one way and some of us feel a little differently; because, when you get to the details, and some of the added items, there are differences among the common carriers as to how we see what should happen and how we interpret the present law.

But we are all strongly in favor of giving the homeowner equal rights to a cable subscriber, probably no more, and probably no less. We will all be scrambled by early in 1987.

As you are probably aware, Eastern Microwave, with WOR, has already scrambled, and has taken a position that they are not allowed to descramble a homeowner under the copyright law. That is probably a good thing to do.

But for my own company and United Video, we have chosen to wait and give Congress time to change the copyright law and be absolutely sure. There is common carriers law that we are subject to, which says that we can't discriminate and we must serve all users.

There is also an argument that Eastern Microwave, having scrambled, cannot refuse to take orders. It is damned if they do, and damned if they don't. That is my reason for delaying scrambling.

For my own company we will delay until early in 1987, because we understand Congress' problems in getting legislation through and know that you hope to get it through by late this year, and we would hope to scramble a few days or weeks or months later. We have purchased all the scrambling gear and it is in place.

Many of our cable affiliates have purchased their scrambling equipment, and will just leave it sitting on the shelf until Congress acts.

We do worry and want to be sure that everybody understands that the difference between a superstation and an HBO, or CNN and ESPN, is that we do have copyright problems that need to be dealt with. We believe that Mr. Valenti and his people representing the programmers deserve to be paid, at least an equal amount to what they are paid by the cable industry.

As a matter of fact, if you used the bus analogy, that might be what common carriers really are, that we all understand. The bus uses city right-of-ways, has a city franchise, and drives up and down the street. But the bus system wouldn't work if you didn't charge everybody at least something to get on and off the buses, and make it partially subscriber sustained, and it would be better off if it eventually got to the point where the riders paid the entire expenses of the bus system, and it was at least breaking even.

Presently, the TVRO owner gets a tremendous advantage, he neither pays the program owner, nor does he pay his share of the gasoline to deliver the programming down the street. We think he should pay exactly proportional on the same amounts, in that kind of instance.

We do, after congratulating you, think that you have made the problem bigger than it need be, and we would urge some simplification. Probably the primary example is that you have chosen to involve the SMATV's in your bill. The SMATV industry and the cable industry, and the programmers, have all resolved the problem that ourselves several years back in the marketplace, by treating SMATV as a cable system for compulsory license purposes when talking about the CRT. They are not a cable system when we talk about to the FCC, under FCC regulations.

That is working in the marketplace. I see no reason that you should cloud your bill and confuse it by adding SMATV wading words at this point.

It has been going on for years. Nobody is mad; nobody is filing lawsuits. It isn't even like the district court argument between the programmers and cable industry on CRT fees. Nobody is fussing about it; and why not leave it alone.

Second, it must be understood that this is a copyright bill, it is not a scrambling bill. It is quite clear under the law that we are able to scramble our signals and that we are able to then charge and allow descrambling to happen.

We also understand the hue and cry that the TVRO owners are putting up, and that the other would-be distributors want to get in the act. Common carriers, unlike HBO and Showtime, have to, under FCC regulations, and with an intelligent body looking over us, treat our customers on a nondiscriminatory basis. So we will have to work with these other distributors.

Again, in your bill, you try to put some copyright type of penalties on us as common carriers if we discriminate between one distributor or another. With only 10 cent type of charges we have to deal with every distributor.

With wanting every homeowner in America to get my signal and pay me 10 cents, I am going to work with every darn distributor that comes along, if he is reputable. I am not going to get involved with some flake in the middle that causes me all kinds of problems. But if he is reputable we are going to have a nondiscriminatory price.

But we don't think that part of your bill is necessary at this point, and in the interest of getting something through that lets the homeowner legally have the signal and pay his fair share of the fee, we think that portion of the bill could be simplified by just not addressing that particular issue.

Last—well, I guess, two other places that we think you have made fairly complex. The 12 cent fee, and the method of calculation of it; we sort of agree that is the right number, looking back last year at the cable fee.

We would propose that you just take that same formula and specify to the CRT that they make that calculation each year. And rather than 4 years out get into some long and messy arbitration type of thing, let it track just 1 year behind what the cable industry has paid, as your formula works.

Therefore, if the cable industry, a big powerful industry, fighting with the programming industry, both adequately represented by strong associations, drives that number down to 8 cents, the homeowner will pay 8 cents. If Jack Valenti drives that number up to 16 or 20 cents, the homeowner will pay 16 or 20 cents.

There is an imbalance, because how are all of these little homeowners going to fight with the power of the association spokesmen. You gave me a heck of a disadvantage in following Jack Valenti on this, it is a ridiculous place for an Ed Taylor who is not a public spokesman and doesn't feel comfortable talking a large group of people, to follow Jack Valenti.

But imagine the little homeowners trying to argue with the power of the movie companies. Even pitting my company, which I am very proud of, but which at most is a $100 million company, against Jack Valenti's clients who make $100 million individual movies, hopefully, monthly, because we all want that product be very, very good, and very successful.

So even having the common carriers, if you will, in arbitration and trying to take on the muscle, I would submit that you need to allow an equal fight. And an equal fight may well be what Jim Mooney, and NCTA and Jack Valenti dance around.

So we could avoid the problem, not only for you in Congress, but for us as common carriers by just setting a system that tracks the cable subscriber fee.

Last, the sunset provision. Maybe that is the biggest argument of all. When does that sunset need to come?

Again, possibly Mr. Mooney and Mr. Valenti have to argue that through and settle it as two large associations. To put my small company and the individual TVRO homeowner out in front, and say we have to battle the sunset, we have to settle the rates, when it will be settled gradually between these two industries is not productive. You have complicated this little bill intended to just fix things up for the homeowner, by putting some provisions in it that it might die before the associations settle all their arguments. I don't think that is necessarily a good part of the bill.

In total, if we had to vote today, between having this bill, exactly as it is written, or no bill at all for 6 months or 9 months, we would take this bill, and we would worry about the extra expense at the copyright tribunal, we would worry about the sunset provision. I think all of us came to that conclusion that this is better than nothing at all.

Thank you for letting me be here; I will answer any of your questions.

[The statement of Mr. Taylor follows:]

TESTIMONY OF EDWARD L. TAYLOR, CHAIRMAN, PRESIDENT AND CEO OF TEMPO ENTERPRISES, INC., ON BEHALF OF SOUTHERN SATELLITE SYSTEMS, INC., UNITED VIDEO, INC., AND EASTERN MICROWAVE, INC., CONCERNING THE SATELLITE HOME VIEWER ACT OF 1986, H.R. 5126, BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMMITTEE ON THE JUDICIARY, ON AUGUST 7, 1986.

TESTIMONY OF EDWARD L. TAYLOR

Mr. Chairman and distinguished Members of the Subcommittee, I thank you for the opportunity to appear before you today to present the views of the satellite carriers of the three "Superstations" concerning the Satellite Home Viewer Act of 1986, H.R. 5126.

I am Chairman, President and Chief Executive Officer of Tempo Enterprises, Inc., ("Tempo") which is the successor corporation of Satellite Syndicated Systems, Inc., and is the parent company of a number of operating communications companies including Southern Satellite Systems Inc. ("Southern Satellite"). I began my career with AT&T, spending 16 years with that company the last several of which were as a Satellite Project Engineer. From 1970 to 1972 I was President of Creative Consultants, a satellite communications consulting firm. Thereafter I served as President of United Video Inc., a microwave common carrier. After that company was sold to Southern Pacific Communications Company I became Regional Vice President with Southern Pacific. Later I was Vice President of Sales and Market Development for Western Union prior to organizing and operating Southern Satellite. I am appearing today on behalf of Southern Satellite, United Video, Inc., ("United Video") and Eastern Microwave, Inc., ("Eastern Microwave").

Southern Satellite, United Video and Eastern Microwave are the Federal Communications Commission authorized satellite resale carriers which deliver Superstations WTBS Channel 17 Atlanta, Georgia, WGN-TV Channel 9, Chicago, Illinois and WOR-

TV Channel 9, New York City-New Jersey respectively to cable television systems throughout the United States. In 1976 all distant independent television stations were delivered to cable systems by terrestrial microwave carrier. However, this mode of delivery was limited by technological and economic factors to regional distribution generally limited to three or four states. Southern Satellite began delivery of WTBS to cable systems throughout the country by satellite in 1976, United Video began satellite delivery of WGN-TV in 1977* and Eastern Microwave began its satellite delivery of WOR-TV in 1979. Through these carriers' national distribution, WTBS, WGN-TV and WOR-TV became the "Superstations" of the cable industry. The Superstations proved to be an extremely popular cable service, soon being distributed to millions of homes on a nationwide basis, 24 hours every day. The Superstations are now delivered to more than 35 million cable homes, representing over 90% of all cable homes served by over 10 thousand cable systems.

From their inception until the present Southern Satellite and United Video have limited their services almost exclusively to the cable television industry delivering an unscrambled signal throughout the country. Eastern Microwave also has limited its services to the cable television industry, and in March of this year Eastern Microwave commenced delivering WOR-TV as a scrambled signal. Additionally both Southern Satellite and United Video are now committed to protecting their signals through scrambling. United Video has announced that it will commence scrambling in the fall of this year and Southern Satellite plans to begin scrambling early in 1987. Scrambling has become necessary because of the satellite program piracy problem. Programming intended and paid for by legitimate paying customers is being improperly intercepted and used by individuals and businesses who are not paying for the service. The carriers are presently losing hundreds of thousand of dollars to hotels, motels, bars and similar establishments as well as SMATV and CATV systems that intercept and use their signal for commercial purposes but who do not pay them for that service. The most obvious answer to this piracy is encoding or scrambling the signal transmission.

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*KTVT, Dallas and WPIX, New York are also distributed by satellite by affiliates of United Video.

The three carriers have all received requests to deliver the Superstations to private TVRO dish users for many years. This is a market which all three wished to serve but did not serve because of the existence of Copyright issues which could not be resolved with certainty. Because the Superstations are FCC licensed television stations, specific copyright considerations apply to them that are not applicable to the other cable satellite services such as Home Box Office, Cable News Network or ESPN. While the three carriers differ on their view of the legal issues all three agree that the unquestionably preferred solution is embodied in the subject Satellite Home Viewer Act of 1986.

All three carriers agree upon the need to scramble to protect their service and income while not wanting to shut out the TVRO dish owners from this service. Although H.R. 5126 has consistently been mistakenly referred to in the trade press as as a scrambling bill it is not scrambling legislation. It is copyright legislation which is needed because of scrambling. All three carriers agree that an extension of the compulsory license to include Home Viewers is the favored copyright solution. It is for this reason that the carriers support the general purpose of the Satellite Home Viewers Act of 1986 which I would now like to discuss in more detail.

Although, the carriers support H.R. 5126 there are a few specific provisions of the bill that the carriers believe are in need of modification. I would like to address these specific sections.

§119(a)(4): This section makes it an act of infringement if the carrier discriminates against any distributor. We have both basic conceptual problems as well as specific problems with this section. First, there is a very basic jurisdictional problem with this section. This section deals exclusively with the issue of a carrier discriminating against its customers or its potential customers. The section has nothing at all to do with copyright rights or violations, in fact it specifically makes a violation of the Communications Act of 1934 or the FCC rules a per se violation of the Copyright Act. This is completely unnecessary. The FCC has total jurisdiction over the carriers and is the expert agency best equipped to handle carrier discrimination complaints. Because of this there is obviously no need for Section 119(a)(4) in Copyright legislation and in fact it does not belong there. Its existence is simply an invitation to a plethora of unwarranted Copyright litigation.

Nonetheless if despite all of the foregoing infirmities, the Congress includes this section in the legislation, there are modifications which are absolutely necessary because of some very specific problems with this section. As written the section make the carrier's action a criminal offense. Furthermore the remedies include impounding and disposition of infringing articles and seizure of all copies, phono records, plates, molds, matrices, and the like, none of which is applicable to the subject matter of section 119(a)(4). Because discrimination against any distributor is an act of infringement, standing to invoke the appropriate remedies should be limited to distributors to avoid harassment suits by parties who do not have an interest in the distribution of the carrier's signal. Additionally since the improper discrimination is that which violates the Communications Act of 1934 as amended, or rules issued by the Federal Communications Commission, it is urged that the section specifically indicate that the prohibited activity is limited to unjust or unreasonable discrimination. Discrimination per se does not violate the Communications Act. And, because a distributor will not be a copyright owner, the bill should only provide for relief which is necessary to remedy a violation of a provision of the bill. For example, an injunction prohibiting future discrimination against a distributor would be an appropriate remedy. As proposed, the bill would provide broad provisions for damages under sections §504 and §506 which are applicable to the infringement of works where a copyright holder or its licensee holds an interest. These damage provisions are not relevant where the distributor has no claim or title in the works being transmitted. It is noted that under §510 of the Copyright Act, a TV station that brings an action for infringement for commercial substitution and that does not hold a copyright or license in a work which is altered is limited to injunctive relief, costs, and actual damages suffered as a result of the infringement.

The carriers also believe that while a court has the power to make a determination as to whether there has been unjust discrimination under this section, it would be appropriate to require that a distributor or potential customer first bring an action to the FCC, and that only after an FCC finding of an unjust or unreasonable discrimination should a party have standing to bring a suit under the provisions of section 119.

§119(c): Section 119(b)(1)(B) establishes a home viewer royalty fee of 12 cents per month until no later than December 31, 1990. It should be noted that a United States District Court ruling of last week (NCTA v. Columbia Pictures [D.C.]) may well require a reduction in the home viewer royalty fee. Thereafter the fee until December 31, 1994 must be determined either by voluntary negotiation or by compulsory arbitration.

The carriers believe that the procedures established under either method are so cumbersome, complex and potentially time consuming that the costs involved would be so high as to result in a significant unwarranted additional expense to the home viewer since obviously the charge to the home viewer reflects, in part at least, the operational and administrative costs of the carrier. Furthermore the carriers believe that the provisions are unworkable. For instance Section 119(c) (2)(B) & (C) allow the Register of Copyrights to choose a common agent for the carriers while imposing the costs of the negotiations upon the carriers and binding the carriers to any agreement negotiated by the agent chosen by the Register. Furthermore the compulsory arbitration under §119(c)(3) is binding on all parties except the Register of Copyrights and the Register can reject the recommendation of the Arbitration Panel and set the royalty fee himself. The procedures established by Sections 119(c) are such that litigation is virtually inevitable. The District of Columbia Court of Appeals has noted "the boundless litigiousness" of copyright claimants before the Tribunal. Thus the compulsory arbitration provisions of the bill under §119(c) will undoubtedly lead to similar litigation. These two provisions change a bill that otherwise reflects the virtue of straight forward unencumbered legislation designed to permit delivery of superstations to backyard users with a minimum of cost and a maximum efficiency into a mind boggling complexity of procedures that will clearly consume months and months of the time of many parties with the likely possibility that the end result will be merely to reestablish the rate set forth in this bill. The fee should remain at the legislatively established rate subject to periodic cost of living index adjustments.

§119(d)(7): Under the definition of subscriber the Act includes subscribers to SMATV systems as private home viewers. At present SMATV Systems which deliver distant television station signals to their subscribers register with the Copyright Office and pay royalty fees as functional equivalent cable systems. Thus these viewers have all of the satellite services available to them and the copyright owner is compensated through the SMATV operator.

The definition of a cable system in the present act encompasses SMATV systems which are functionally equivalent to cable systems. Under the proposed bill, an SMATV system and a CATV system which are functionally equivalent and which deliver superstations to the same apartment building would pay royalties under two different formulas and rates. Thus §119(d)(7) would create unnecessary confusion and paper work in an area that is presently working to the satisfaction of all, and in fact could lead to a contraction of satellite services because under the bill, the compulsory license would extend only to the delivery of Superstations, and SMATV systems currently provide both Superstations and other distant signals to their subscribers. It should also be noted that the Copyright Office has been accepting filings and payments under section 111 from SMATV operators since 1978, and is soon to begin a rulemaking into the status of SMATV systems under the Act. This is a situation where the the axium "if it ain't broke don't fix it" is clearly applicable.

§4. The termination of the Act on December 31, 1994 is the sunset provision. The carriers feel that this provision should be deleted as no compelling need has been shown for a sunset. On the other hand it is extremely unfair to the satellite home viewer to deny the Superstations to them seven years after the Act gives them the right to receive those services. Significantly the entire impetus for this type of legislation came from the clamor that has arisen throughout the country concerning the basic unfairness of having the skys go dark for these viewers who rely so heavily on satellite services, a concern which Congress apparently shares. Yet a sunset provision would in an almost cruel way open up the Superstation reception window for these viewers and then seven short years later slam it shut again. Ironically it would be Congress making the skies go dark. Also the cost to the carriers to gear-up for home viewer service makes such a provision extremely unfair to them. Tempo estimates that its costs to serve the home viewer will run into the hundreds of thousands of dollars per year although this is extremely hard to predict because no one knows how much of a home viewer market will develop. Estimates have ranged between a few hundred thousand to the millions of home viewers.

The following technical changes are also suggested.

1. §119(a)(1) at page 3, lines 15 and 16 change the word "from" in each line to the word "to".

2. §119(d)(2) at page 16, lines 24 and 25 delete the word "satellite" before the word "secondary" on line 24 and add the word "satellite" before the word "carrier" on line 25 [thus conforming to definition (5) on page 17].

3. §119(d)(4) at page 17, line 13 delete the word "broadcast" before the word "station".

4. §119(d)(8) at page 18, line 11 delete the word "broadcast" before the word "station".

5. §4 at page 20, delete Sec. 4 in its entirety [see discussion in text concerning §119(c)]

I hope that I have effectively conveyed to this Subcommittee the enthusiastic support of the satellite superstation carriers for the purposes designed to be achieved by this Bill. I hope also that our criticisms and suggested modifications will help to make H.R. 5126 an even better Bill. I will be most pleased to answer any questions.

Edward L. Taylor
for

Southern Satellite Systems, Inc.
United Video, Inc.
Eastern Microwave, Inc.

PHF:12-1

Mr. **Kastenmeier**. Thank you you for that rather unenthusiastic embrace of this bill. But nonetheless, I understand your point of view.

Another point that Mr. Valenti made, that is the freezing of the number of superstations to be accommodated in this legislation; how do you and your colleague companies react to that?

Mr. **Taylor**. Well, I think we would just as soon let it stay open, because I believe that each of us might launch additional distant signals, if you don't close the door. But not immediately; you could not support an additional distant signal into just 1.5 million homes without charging a very, very high rate, and it would die a slow death, because I have just finished telling you that my company will charge about the same rate as it charges cable operators. Additionally there are obviously our administrative costs so that additional distant signals are probably not practical today. But if you envision 1990 and 10 million homes, each paying 10 cents a month, that is a dollar per home a month. You would have $10 million in revenue even with ku-band and new satellite technology. The expense of operating such a network would be $6 million or $7 million. So it is a doable business to have superstations, or whatever you want to call them, TVRO stations will evolve and work as additional bus routes in the city, and might serve the city better.

I think it concerns that type of thinking on the basic issue of, whether you want to close the door. By the CRT going to 3.75 percent they economically closed the door on cable. There is nothing in your bill that economically closes that door on the homeowner.

If it is not closed by these economics, you will have a problem a couple of years from now when there are enough homeowners out there to justify uplinking another distant signal. That might not be all bad. That might be the first instance where the TVRO industry has its own unique programming, or at least substantial programming placed on the satellite for them.

Because if you will remember the history in cable and satellites, it was HBO, and my signal distributing Ted Turner's WTBS. It was new movies and old movies from Ted Turner. I was distributing his signal and he was promoting the movies. And Pat Robertson was willing to put the word of God up there on the satellite. And it was only the three of us up there for over a year and a half. If there hadn't been a lot of push there would not have been all the rest of these 50, or so, what we call, Johnney-come-latelies in our business.

Maybe you don't want to close the door, maybe you want to leave them an opportunity. It is tough for the TVRO industry to have their own programming, unless maybe they launch new superstations.

Mr. **Kastenmeier**. You mention at the outset that you and the other two major common carriers were strong competitors. Do you disagree on issues relating to this, or any of the subissues relating to this?

Mr. **Taylor**. Probably, it involves disagreements on how you set the 12 cents in the future. Whether or not we should try to go the arbitration route 4 years out. Some people feel that arbitration should absolutely be out. Where others say, well, we could live with it easily.

Probably, the biggest disagreement would be if there were no bill; what would we do?

I think one other carrier would scramble and go ahead and descramble, and argue that no copyright fee gets collected until Congress acts, but that he can legally go ahead and do everything. It is just that he would collect his fees and pay nobody. Jack Valenti would miss out on his money, and that is all that happens.

Eastern Microwave, obviously, has not taken that position, and feels very strongly it wouldn't. And luckily I don't to have to vote for myself for a little while; and I am not sure which side I would get on. That is probably the biggest area of disagreement.

Mr. **Kastenmeier**. But if it comes to whether a course of action of scrambling, descrambling, and sale to individuals would be a violation, at least as suggested by Ralph Alman, of a common carrier——

Mr. **Taylor**. Most of us believe that there is no problem with scrambling. The key is whether or not you have a problem when you descramble to an individual and collect your own fees, and nothing gets paid to the copyright owners. We would probably hide behind the communications law, if we took the positive argument. That is the argument that says you can scramble, you can collect your own fees, and the homeowner just gets away with not paying any copyright fees. And you probably would say, well, all right, we have done that under communications law, and some day the homeowner will have to pay some money when Congress gets around to settling a copyright fee.

If you remember, the cable industry didn't pay anything at all for the many years of its start-up existence, and the rates came later. So, you could follow that precedent.

Mr. **Kastenmeier**. Under existing law could an independent television station buy space directly on a satellite transponder and in a sense become a superstation without dealing directly or indirectly with a common carrier?

Mr. **Taylor**. He would be violating most of his contracts with his programmers. His contract to buy the program says he has bought it for that market and he will not of his own volition take it out of that market, so he doesn't have the rights.

Mr. **Kastenmeier**. So the sole limitation, as you see it, would be his contracts with those who sell him programming?

Mr. **Taylor**. That is right.

Let me yield to my colleagues here.

The gentleman from Ohio, Mr. DeWine?

Mr. **DeWine**. I have no questions, Mr. Chairman.

Mr. **Kastenmeier**. The gentleman from Virginia, Mr. Boucher?

Mr. **Boucher**. Thank you, Mr. Chairman.

I think it might be somewhat useful, Mr. Taylor, if we got on the record, just a description from you as to how the common carrier operates?

How do you fit into the link between the television station, the satellite, the distributor, and the ultimate consumer of the signal and what are your contractual relationships, the nature of compensation among those various entities?

Mr. **Taylor**. OK; I would prefer to start at the cable subscriber. The cable subscriber of a system pays the cable system a fee for bringing our signal in. He pays the copyright fee and he pays an additional 10 cents per subscriber to the carrier. In some instances, there are some pretty huge discounts to the various carriers as they get bigger in volumes.

Our whole contractual relationship is with that cable system, to deliver to him the signal; in our case WTBS, and in the other cases WOR, WGN. That is the only real contract relationship.

We all have either ownership or rental agreements with the RCA or Hughes Galaxy Satellite System to rent or buy a transponder. We all have installed multimillion dollar up-link facilities, because we all protect them very well and make them very sophisticated with backup power, and high-technology units.

In most cases we take the signal off the air as broadcast in the local market, and deliver it to the satellite. The cable operator is asked to buy his own Earth receiving station. And when we move to scrambling they will all buy their own descramblers.

Some of the small ones are not too happy about doing that. But we have said that you have to do that. That about ends our contract relationships with everybody.

Most of us have annual prepayment discounts and 3-year type of contracts with our cable operators to simplify billing and to be sure that we will still be in business for a few years.

Mr. BOUCHER. Thank you, I think that is very helpful.

Let me ask you the same question that I asked Mr. Valenti. You perhaps have not had the extent of dealing with the Copyright Royalty Tribunal, and the Copyright Office that Mr. Valenti has, but do you have any thoughts on which of those entities would be more appropriate to handle the copyright fee distribution that this bill foresees?

Mr. TAYLOR. I would much rather that you just specify a simple formula and don't let them exercise too much wisdom, because so far the people that have been there haven't exercised very good wisdom, in my judgment.

You have a problem there but there is a bigger problem with everything else that is subject to copyright.

Mr. BOUCHER. Well, assuming that some Federal agency will exercise a role in administering this system, do you have a preference between the Copyright Tribunal and the Copyright Office?

Mr. TAYLOR. Probably the office is better.

Mr. BOUCHER. Thank you very much.

Mr. KASTENMEIER. The gentleman from Oklahoma, Mr. Synar?

Mr. SYNAR. Thank you, Bob.

Let me ask you a couple of things, Ed. First of all, as you know, Bob and I have expressed in the bill an interest to sunset this legislation. You have expressed in your testimony some concerns about the arbitration requirements, that you think that they will encourage litigation; should we eliminate the arbitration period, in your estimation, and just let the entire act expire in 8 years?

Mr. TAYLOR. No, I am trying to convey the idea that the sunset issue should just be ducked for now. Someday the cable industry and MPAA will make some other arrangements. It doesn't seem like Congress, which is responding at this point to a tremendous outcry from TVRO station people, should take any action that would some day take away the equality with the cable operator which is exactly what H.R. 5126 gives them. I think what the TVRO industry is asking of all of us, is for equality.

I just don't see why we should give this to Mr. Valenti although I understand his argument that this all should come to an end some day and that you should have a collection mechanism.

Mr. **Synar**. So, you are saying there shouldn't be sunset legislation?

Mr. **Taylor**. That is right.

Mr. **Synar**. All right, let's assume for a second that we don't have that disagreement, there is going to be sunset in this legislation, how should the arbitration period play in; would you prefer to have it?

Mr. **Taylor**. I think we would prefer to have the formula continue to work, and let the amount of the copyright fee track that of the cable systems for the whole 8 years.

Mr. **Synar**. Let me go on another track. And this is more for back home. As I travel through northeast Oklahoma, where you are from, the thing that I get is generally what every one says and agreed to, is that the TVRO people do want to pay a fee, they think that fee should be reasonable. The question is how do define reasonable?

One of the things that I would like to hear your comments on; should we take into account the investment in equipment that a TVRO person has in determining the fee and, therefore, having a fee which may be less than what a cable subscriber should get; should that be taken into account that some of the people have invested upward to $2,000, $3,000, $4,000, and a decoder $400, et cetera?

Mr. **Taylor**. No; I don't think it should be taken into account because a lot of those people bought their dishes very early in the technology. That would be equivalent to me being able to go to the tape store right now and rent a tape for less than 99 cents because I paid $1,000 for a Beta machine 6 years ago and now you can buy one for $300.

Mr. **Synar**. So, you are saying that we shouldn't take that into account because they made the decision to put that kind of money forward, as the technology evolves, the equipment is going to become cheap enough to where it will be insignificant on the total cost, therefore, that the fee paid by TVRO and cable should be the same?

Mr. **Taylor**. That is right.

Mr. **Synar**. Do you think that is the generally held opinion of Oklahomans who have TVRO?

Mr. **Taylor**. No, not at all.

Mr. **Synar**. Is that the generally held opinion of most cable operators in Oklahoma?

Mr. **Taylor**. Yes; cable operators believe that the retail value of their products should be upheld and that the TVRO owner should pay about the same retail price. They are even worried about what might happen as we have other distributors emerge. Normally a retailer will more than double, if he can, what he pays to the wholesaler. That is pretty common in any business you want.

Mr. **Synar**. Thank you.

Mr. **Kastenmeier**. Mr. Coble, do you have any questions?

Mr. **Coble**. Mr. Chairman, I apologize for my delay, I had another meeting.

I have no questions, thank you.

Mr. **Kastenmeier**. Mr. Mazzoli.

Mr. **Mazzoli**. No questions.

Mr. **Kastenmeier**. If not, Mr. Taylor, we thank you for your appearance here this morning.

I might ask, you do not purport to speak for WPIX or WKTV, whoever they are, who are the common carriers in connection with those two enterprises; is that correct?

Mr. **Taylor**. No, that is our error in the way we wrote the document, sir. They are actually part of United Video, as well. United Video puts up three.

So, yes, we are speaking for them. United Video is the one company that does three superstations. We just wrote the document to add them in.

Mr. **Kastenmeier**. You speak expressly for three of them; and by delegation for two others?

Mr. **Taylor**. That is right.

Mr. **Kastenmeier**. Thank you very much, Mr. Taylor, for your appearance here this morning.

Next I would like to greet Mr. James P. Mooney, president of the National Cable Broadcast Television Association. NCTA membership includes more 2,000 cable televisions systems, operating throughout the United States. Jim Mooney has been an ardent and very able spokesman for the cable television industry every since he became president of NCTA in April 1984.

He has also been of great assistance to the subcommittee. I personally consider him to be a friend and a highly competent advocate for his organization.

Mr. Mooney, you may proceed as you wish.

STATEMENT OF JAMES P. MOONEY, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. **Mooney**. Thank you, Mr. Chairman, for the kind words. If it is agreeable to you, I will submit my prepared statement.

Mr. **Kastenmeier**. Without objection.

Mr. **Mooney**. For the record, and simply summarize it.

Mr. **Kastenmeier**. Your statement will be received and those of other witnesses, for the record.

You may proceed in summarized form.

Mr. **Mooney**. Mr. Chairman, H.R. 5126, would allow scrambled superstations signals to be delivered to the owners of backyard Earth stations. And in doing so, it would pursue the same public policy objectives as are pursued by its counterpart already in the copyright act, cable compulsory license, which, of course, is simply to broaden the diversity of television viewing opportunities that are available to people all around the United States. That is something that we certainly support. We certainly support the objectives of this bill.

I think that the chairman of the subcommittee may even recall my coming to him earlier in the year and suggesting that this is something which really should be done. The bill also, of course, would have other results. It would provide for royalty fee compensation to be made to the copyright owners of the program involved, and would allow, also, the satellite carriers, who, of course, are responsible for putting these signals up on satellites in the first place, and who have undergone considerable expense in doing so, to recover a fee for the service that they provide in dispersing these signals to television viewers; and we think that is appropriate, also. And we certainly believe that the entire objective of the bill is well within the authority of Congress under the copyright clause of the Constitution.

As with any legislation of this kind, I suppose there inevitably will be some disagreement as to precisely what is the best way to accomplish the end that everyone agrees is appropriate. You have already heard Mr. Valenti, and Mr. Taylor have some comments in that regard.

We are in general agreement with the comments made by Mr. Taylor, having to do with carrier discrimination, the role of the register of copyright, and although he did not say so when he sat at the table in his prepared statement, on inclusion in this bill of SMATV systems. I am, frankly, in that respect a little puzzled, I am not sure what SMATV's are doing in this bill, as we understand them already to be covered under the provisions of the cable compulsory license.

I would add also that we would suggest that the committee consider carefully whether it is the carriers themselves to whom the committee really wants to grant the compulsory license in this instance. Carriers are subject to all sorts of arcane rules under the Communications Act.

I think that you might consider simply granting the compulsory license to anybody who is financially responsible and in a position to perform the function of actually retailing and delivering these signals, whether it be cable operators, or dish dealers, or anyone else.

Third, it will not surprise the committee to learn that we find the sunset provisions of the bill somewhat troublesome, principally, because we think that they might further complicate what already is a rather complicated situation with regard to the development of retail systems for the provision of satellite programming to backyard dishes, generally.

Second, because we, frankly, are very leery of this bill and this issue being used as leverage to exacerbate the controversy which we have seen perennially to surround the cable compulsory license, itself. We think that if the committee is to include a sunset in this bill, we urgently would ask that you make quite clear that in this legislation you don't understand the Congress to be setting a precedent with respect to anything else, and that other questions will have to be fought out and argued out on their own merits.

Finally, we believe that in view of the decision last week by Judge Greene of the District Court for the District of Columbia, the 12-cents figure, which we understand to be derived from what cable subscribers currently are paying, may be a bit high, but Mr. Synar has already drawn that issue out sufficiently and I won't elaborate on it.

I would simply conclude, Mr. Chairman, by saying that given the obvious support that this legislation has in the subcommittee, and given the atmosphere of sweet reason and accommodation which seems to be surrounding these discussions this morning, so far as the various industries are concerned we see no reason why legislation to accomplish the purpose of this bill should not be enacted in this Congress, and we very much hope you will do so.

I will stop there and be happy to answer any questions.

[The statement of Mr. Mooney follows:]

STATEMENT OF
JAMES P. MOONEY
PRESIDENT

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BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

AUGUST, 7, 1986

STATEMENT OF JAMES P. MOONEY, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION, BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, AUGUST, 7, 1986

Mr. Chairman, members of the subcommittee, my name is James P. Mooney. I am President of the National Cable Television Association.

NCTA is the principal trade association of the cable television industry and represents over 2,400 cable systems serving more than 75% of the 40 million cable homes in the United States. We also represent 56 cable programming services who create, package, and provide quality TV programming for cable subscribers.

The purpose of H.R. 5126, the Satellite Home Viewer Act of 1986, is to bring the copyright law up to speed with the latest technology.

As the subcommittee is well aware, cable television systems have for over thirty years retransmitted the signals of distant broadcast signals to their subscribers, a practice which since 1976 has been governed by the cable compulsory license provisions of the Copyright Act. Over thirty seven million cable households today receive one or more distant signals, and the so-called "superstation" is now a well established feature of the television landscape.

In return for retransmitting these signals, cable systems last year paid nearly one hundred and fifty million dollars, approximately two-thirds of which went in the form of royalty fees to the copyright holders of the programming contained on these signals. The remainder went to the satellite carriers which deliver the signals to cable operators' headends.

H.R. 5126 would amend the Copyright Act to permit these signals to be sold as well to owners of backyard dishes. Since the FCC eliminated its licensing requirements for satellite signal receiving stations in 1979, nearly one and a half million households -- most of them, but not all, in rural areas -- have purchased satellite signal receiving equipment so as to be able to receive cable satellite programming direct in their homes.

Mr. Chairman, the proliferation of backyard dishes is not a phenomenon which NCTA has opposed. We did not oppose the action of the FCC in 1979 allowing unlicensed private ownership of backyard dishes. We did not oppose the action of the FCC just a few months ago preempting the authority of state and local governments to impose zoning restrictions on backyard dishes. We did not oppose the decision of Congress in 1986 adding an amendment to the Cable Act to establish that it is not unlawful per se to view unscrambled cable satellite programming.

What we do seek is to protect the economic integrity of our product as pay television, and that is the reason the cable programming services are scrambling their signals. The proliferation of backyard dishes has resulted in pay television product being effectively given away, and while our programming services fully intend to sell their signals to backyard dish owners, scrambling the signal is the only way to insure that payment actually is made.

Distant signals, of course, are different from most satellite services in that they are not "made-for-cable" in the sense that programming services like ESPN, CNN, USA Network, BET, Arts & Entertainment, and others are. The cable industry has no proprietary rights, direct or indirect, in the programming contained on distant signals, and we do not share in the one hundred, plus, million dollars a year the copyright owners -- principally Hollywood -- have been collecting for the use of distant signals by cable subscribers. The economic benefits of scrambling these signals -- and allowing their subsequent sale to backyard dish owners -- would accrue entirely to the copyright owners in the form of royalty fees, and the satellite carriers in the form of transmission fees. To the degree that cable operators would be involved at all, it would be as retail sales agents, a role which in the context of this bill would be determined by the carriers.

Mr. Chairman, just as the cable industry has not opposed previous steps taken by the Congress and the FCC to legitimize the backyard dish industry, we do not oppose legislation to allow distant signals to be sold to backyard dish owners. In fact, as I said at the outset, this legislation seems to us to be quite properly intended to bring the copyright law up to speed with the latest technology.

We would offer for the subcommittee's consideration, however, a number of observations on the specifics of the bill which we hope will be accepted in the constructive spirit they are offered.

-- First, we are in general agreement with the comments made by Mr. Taylor, having to do with carrier discrimination, the role of the Register of Copyrights and the treatment of SMATV systems. I note in particular that we are puzzled by the presence in this bill of SMATV systems, since our understanding of the existing Act is that SMATV systems are considered equivalent to cable systems under current law.

-- Second, we would urge the subcommittee to consider carefully whether it wishes to grant to the carriers themselves the compulsory license for retail distribution of these signals. This seems to us to enter a legal thicket involving the status of carriers under the Communications Act which might well frustrate the overall purpose of the legislation.

-- Third, we believe that the sunset provisions of the bill are unnecessary, will over the long run hamper development of marketing mechanisms to make these signals available to dish owners, and most important, will be seized upon by our friends in Hollywood to further exacerbate the political controversy which has for so long surrounded the cable compulsory license itself. Put bluntly, we think Hollywood regards this sunset provision as a wedge to be used to gain repeal of the cable compulsory license in its entirety. It is our view that if that question is going to be raised, it ought to be raised squarely and directly, with everyone given a chance to have their say, and that the dish owners shouldn't be used as a pawn in a larger game.

-- Fourth, we understand that the twelve cent royalty fee contained in the bill was derived by computing the average current price per distant signal, per subscriber, paid by cable systems. We do not argue the accuracy of this figure up to last week, but must bring to the subcommittee's attention that the twelve cent figure has been thrown into severe question by the action of the U.S. District Court here in Washington, which last Thursday threw out the Copyright Office's fee computation schedule as unreasonable and contrary to the intent of Congress. Thus the twelve cent figure probably is high, by quite a bit.

Mr. Chairman, a word on that court decision seems appropriate. I recall saying to the subcommittee last year that in our opinion the principal flaw in the entire cable compulsory license system is that it seems designed to insure continuing controversy. The copyright bureaucracy, and I am referring to both the CRT and the Copyright

Office, seem inevitably to exercise their discretion in a way wholly loaded in favor of the copyright owners and with little or no regard for the interests of the public.

I recall, as well, saying that we don't think this is a situation attributable to any malevolence on the part of the people who staff the copyright agencies, but seems to be a result of the fact that the agencies have in the past seen their constituency as the copyright owners rather than as the public at large. To the degree there is public interest oriented expertise on copyright in the government, it seems to exist only in Congress and the judiciary.

In the most recent instance of the system going awry, the District Court has now had to throw out as unreasonable and contrary to the intent of Congress the rule of the Copyright Office which requires compulsory license royalties to be based not merely on revenues derived from broadcast signals, but from the sale of all cable basic services, including the ESPN's and CNN's and USA's, etc. The subcommittee is not a stranger to this problem, of course, as it has been argued out many times in this forum, and a bill addressing the various inequities of CRT and Copyright Office decisions was reported by you in the last Congress.

Now our Hollywood friends will emit elaborate shrieks of pain at this development, and say it merely demonstrates the futility of the compulsory license itself. I say -- again -- that it demonstrates the fact that there are too many structural frictions built into the current scheme for determining royalties -- frictions which create endless controversies in the courts as well as in this subcommittee and its counterpart in the other body -- and that we'd all be far, far better off with a flat fee system which pretty much ran itself and didn't require the periodic exercise of discretion by the copyright bureaucracies.

I thought last winter that cable and Hollywood were very close to making a joint recommendation to the subcommittee on a then revenue-neutral means to achieve that result, but in the end self interest of the unenlightened variety seemed to prevail. Thus the court had to set things right, and the copyright owners lost an opportunity to permanently lock-in revenues somewhat greater than those they legitimately were entitled to. Perhaps justice tends to prevail, after all.

Mr. Chairman, that concludes my prepared statement. We think you're on the right track as to the overall purpose of H.R. 5126 and we'd be happy to help in any way that we can. I'd be happy to answer any questions the subcommittee might have.

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Mr. **Kastenmeier**. Thank you very much, Mr. Mooney.

Actually is it a fair statement to say that while cable operators and the cable industry, obviously, have an interest in this sort of legislation, it is not certainly a direct beneficiary of it; cable is merely supporting this as a corollary, as a system with which cable has worked in a technological sense. Is that correct?

Mr. **Mooney**. Well, we would not necessarily be the beneficiary of this bill in any respect. The copyright fee would go to the copyright owners.

I do differ with my friend, Jack Valenti, a little bit of his computation of what that would amount to. I think Jack said that if everybody took a signal—if everybody who owned a dish took a signal at 12 cents, that would result in a quarter of a million dollars going into a pool.

By my arithmetic it is more like $2.1 million. If everybody took three signals it would be about $6.3 million. In addition to the royalty fees, of course, the carriers would benefit in that they would be able to collect fees for the transmission service they provide.

No, we wouldn't necessarily derive any benefit from this whatsoever. I suppose, in fact, you could say it would have the result of making competition for us. But we are not against that either.

Mr. **Kastenmeier**. You, of course, as you have indicated, do not like the principle of a sunset provision applying to this bill because you believe that, at least inferentially, it could affect some time in the future the relationships between copyright proprietors and the cable industry, in terms of the cable compulsory license.

I personally do not share that apprehension. If the cable compulsory license were in any respect altered by the Congress or otherwise, it would surely not be because of this particular bill.

One also ought to note, Mr. Mooney, that the sunset in the bill is not just rates; it to liability as well. When the discussion goes to cable a total sunset is not contemplated, it is contemplated as sunsetting the compulsory license, but that the copyright liability would remain. Somehow you would have to negotiate a new free open market liability.

Mr. **Mooney**. I thank the chairman for that observation. That is an intention which we have noticed, but which I think has not been widely noticed with respect to this bill.

Mr. **Kastenmeier**. Maybe I should permit Mr. Boucher to ask this question. I believe he would.

But if he permits me to, I would ask you the same questions he asked the other parties. That is do you think the Copyright Office or the CRT, even though you are not a distributee in this, from your experience, would be better in handling the distribution function contemplated in this bill?

Mr. **Mooney**. Well, Mr. Chairman, last year, last September, I took my life in my hands in an oversight hearing you had, and said that, in my opinion, we have something of a structural difficulty in the operation of this part of the Copyright Act in that the copyright bureaucracies, in which I include both the CRT and the Copyright Office, have a habit whenever given the opportunity to exercise discretion, of simply making more controversy. I said at that time I think that the entire system would work better if you could make it as mechanical as possible and leave less opportunity for the copyright bureaucracies to exercise discretion. I didn't mean to suggest that they are malevolent, or anything like that, that is just the way it comes out.

Mr. **Kastenmeier**. I think you would agree then with Mr. Taylor, if the choice were between the two, you would say neither.

Mr. **Mooney**. I would say, make this thing as mechanical as you can and leave as little opportunity for the exercise of discretion as you can, because that just leads to more controversy, and more fights, and more hearings, and litigation and unpleasantness.

Mr. **Kastenmeier**. If your industry and the motion picture industry were to resume negotiations about fees and the like, as you had seriously undertaken last year, I would hope that this bill would aid in that endeavor. I would hope that both industries might recommence your negotiations. I am not sure that I agree or disagree with that.

Mr. **Mooney**. Mr. Chairman, last winter we were within an inch of working out on a long-term basis a lot of the controversies which have bedeviled the whole subject of cable copyright and the compulsory license; and I would go back to the table tomorrow morning, if there were a table to go to.

Mr. **Kastenmeier**. I thank you for that statement.

I now yield to my colleagues.

The gentleman from Ohio, Mr. DeWine?

Mr. **DeWine**. Thank you, Mr. Chairman.

Mr. Mooney, the amendments that have been suggested by Jack Valenti and the motion picture industry, if they would be adopted, what would be your position on the bill; would you still support it? it?

Mr. **Mooney**. Jack said that he was unhappy about the involvement of the registrar, and that sounded as if he were sharing a concern not unlike that which we have had about the copyright bureaucracies.

I do not have immediately in front of me a laundry list of all of the other concerns that he had. As I recall, he wanted to leave the 12 cents alone, so in that sense—let me briefly read this to you.

"Reasonable cap on the number of superstations eligible for temporary compulsory license." That looks to me like what he is suggesting is to not include regional stations in this.

The only thing I can say about that is that we have found in the cable business that in some parts of the country, regional stations are quite popular. I don't know that the dish owners ought to be shortchanged in that respect. I certainly wouldn't fall on my sword about it.

The bill must be limited only to private TVRO owners; yes, I would agree with that, that is the SMATV question.

Three, it must be limited to the current C-band satellite technology; that would be fine with us. The roles given the copyright office in administering the temporary compulsory license must be reevaluated; well, I am for that. Of course, we have to flesh that one out a little bit to find out exactly what it meant.

Mr. **DeWine**. Do you see any parallel between where the dish industry is today and where your industry was 15 years ago, in the sense of you using signals and not paying for them; some people have made that parallel?

Mr. MOONEY. I wasn't around back in 1976 when, of course, the Congress said we had to start paying for them. In fact, we do pay for them today, perhaps, depending on what happens as a consequence of Judge Greene's decision, we would be paying just in royalty fees, not counting the carriage fees, about $120 million this year, just for this small part of the programming that is carried on cable television systems. The rest of it we, of course, pay for directly.

I think the dish industry is moving along much faster, to tell you the truth, than the cable industry at a comparable stage of its development. You know, cable has been around since the late 1940's, and was the subject of repressive regulation by the FCC for 25-27 years. The backyard dish has only been around since 1979 when the FCC removed its licensing requirements for TVRO's.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Kentucky, Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman.

Welcome, Mr. Mooney. I was probably going to ask you, one, to comment on what apparently is a reality. I was talking to one of my colleagues in the House the other day who told me that in his district the only issue similar to this one, the right of the backyard dish owner to grab a signal aloft and beam it into their front room, the only issue that was more passionately held to and argued for in his experience was the Panama Canal Treaty, which, as we know, was a fundamental issue that really brought agony to a lot of people. Can you tell me why it would be this way; what has been your experience; why do people feel that they have some kind of a right to take a signal down, and they feel it so passionately that they are willing to go to the mat with anyone who wants to limit that right?

Mr. MOONEY. I am vividly aware of this, I can assure you.

Mr. MAZZOLI. Yes.

Mr. MOONEY. I hope it doesn't take as long to work this out as it took to dig the canal.

There are a lot of people, I would venture to say most people, who bought dishes and spent $2,000, $3,000, or $4,000 for the dish, and did so in the expectation that the programming would remain free, and they are deeply put out and annoyed to find that is not the case.

Mr. SYNAR. In many cases it was advertised.

Wasn't it, Jim?

Mr. MOONEY. Yes, sir, it was. In many cases, as recently as 2 or 3 months ago, they were advertised that way. I can tell you that from my own personal experience.

About 2 months ago they had the Washington Home Improvement or Home Appliance Show, or something like that; it is one of these things they run down at the convention center. I went over there looking for some lawn sprinkling equipment. And there was a fellow selling dishes.

I say, a ha, I am going to get the sales pitch. And I was assured that scrambling wasn't going to happen. That Congress was in the process of putting a stop to it, and I could buy the dish and expect not to have to make any further payments.

I didn't argue with the man, I just said, oh, that is interesting, and went off.

Mr. Mazzoli. It points out the problem we have in dealing with it.

Mr. Mooney. Yes; I would add to that, that I am very much aware of the fact that you have got a genuinely populist grassroots issue, and that is what makes it so tough.

Mr. Mazzoli. That is the second part of it. I think in addition to the fact that there may have been billings and advertisements and pledges and promises, I think it goes a little bit deeper.

I think that one of our problems is that this is almost anticipated as a right, a fundamental right of an American citizen to have this kind of opportunity, and for us to do anything to it is abridging his or her rights under the Constitution, almost. It is not that way, obviously. But it becomes such a deeply held, deeply felt aspect that whatever we try to do, of course, is received very differently.

Let me ask you this; in your statement you sort of ponder the question of whether we should allow the compulsory copyright to go to the carrier—the second point, "we would urge the subcommittee to consider carefully whether it wishes to grant to the carrier themselves a compulsory license for retail distribution," and you say this enters a legal thicket. Could you expand on that and why you——

Mr. Mooney. I am not an expert on the Communications Act as it applies to carriers. But my understanding of carriers, both private and common carriers, is that in the general sense, they are supposed to be passive, but here you are making them into the point-of-sale retailer. I think it is hard to be passive and at the same time be the point-of-retailer, and this could backfire on you in that the regulatory authorities who act under the Communications Act, as distinguished from the Copyright Act, could at some point do something, perhaps, premised on other facts and other issues, which would inhibit the ability of the carriers actually, effectively, and efficiently to function as point-of-sale retailers for this particular programming.

Mr. Mazzoli. Let me ask you, and this is my last question, and it may have been asked and it reflects the fact that I haven't had a chance to study this bill as carefully as I will; does it contemplate that this 12 cents per channel, per viewer, be paid to the carrier and then the carrier transmits a payment to the copyright owner; is that——

Mr. Mooney. My understanding of the bill is that 12 cents is a royalty, and a copyright royalty, but the carrier would be responsible for collecting that and putting into the pool, but that the carrier, of course, otherwise could charge an additional fee for his own services.

Mr. Mazzoli. Out of curiosity, I am not around it that much, does the carrier have a knowledge of the people on the ground; are they equipped to actually do the billing and handling, all of the mechanical details here?

Mr. Mooney. Yes; this would plug into the same system which has been established by MACOM, which is the company with proprietary rights to the scrambling and descrambling technology. The same system that MACOM has established at La Jolla, CA, for the descrambling of these signals. And I don't want to tell you more than you need to know about this, but it is an addressable technology. It is complicated. And all I can say is that it works fine.

Mr. **Mazzoli**. Thank you.

Mr. **Kastenmeier**. The gentleman from Oklahoma?

Mr. **Synar**. Thank you, Mr. Chairman.

Jim, let me make a comment first and then I want to ask you a question. First of all, you and I have talked about this legislation before, in particular the sunset provision. I am not trying to put words in the chairman's mouth, but let's put for rest, at least for two of the authors of this legislation, we don't consider this sunset provision as slippery slope for everything else that is being done throughout the industry and all the negotiations going on. We think it is appropriate. We think this type of legislation requires it. We think that it doesn't set a precedent that will affect one way or the other.

I tell you that in the same way I tell Jack Valenti, because he is putting a lot of hope in it. You are putting a lot of mistrust in it.

We had reasons for it, which we have gotten into, and we will get into as we move through. But we don't see it as the same slippery slope that you all perceive it to be.

With respect to that I want to ask you just one question; do you share Ed Taylor's views about the arbitration requirements in the bill?

Mr. **Mooney**. Yes, I do. I have noted in particular that the result of the arbitration proceeding does not seem to be binding on the register of copyright and that takes us right back into the whole question of the opportunity to exercise discretion by the copyright bureaucracies and therefore to make that much more controversy.

Mr. **Synar**. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. The gentleman from Virginia, Mr. Boucher?

Mr. **Boucher**. No questions.

Mr. **Kastenmeier**. The gentleman from North Carolina, Mr. Coble?

Mr. **Coble**. Mr. Mooney, IBS in Atlanta, does that station pay more for its programming than an ordinary independent broadcast station?

Mr. **Mooney**. I understand—I am told that they do. But I do not have direct knowledge of it because those contracts are proprietary and not shared with me or made available for public inspection.

Mr. **Coble**. Well, for the sake of this question, let me assume that they do. Why, then should local cable operators have to pay an additional 12 cents per subscriber?

Mr. **Mooney**. Well, that is a question which has preoccupied the cable television industry for a great number of years. Originally, of course, cable television operators did not have to pay a royalty fee, and the Supreme Court said twice they didn't have to. And there ensued a great political and legislative controversy which ultimately culminated in 1976 in enactment by Congress of the cable portion of the copyright act, and was the product of an agreement between my industry and the motion picture association and a joint recommendation made by those two organizations to this subcommittee.

Essentially what was agreed to by the MPAA was there would be a cable compulsory license for cable systems. And what was agreed to by my side in return was that we would pay them a royalty.

So this thing has—there is a historical development to this. It is largely, I think it is fair to say, to some degree is the result of political compromise that has been made by the respective industries.

Mr. Coble. I guess, would that constitute double payment?

Mr. Mooney. A lot of cable operators believe that it does. I don't think that it is in my brief to argue the case for the other side.

But I suppose the movie people would say that the reuse of the product ought to generate some additional revenue to them as it confers a benefit on the reuser. Whether you agree with that or not is a question so difficult it is almost Talmudic.

Mr. Coble. Thank you, Mr. Mooney.

No further questions, Mr. Chairman.

Mr. Kastenmeier. The gentleman from California, Mr. Berman?

Mr. Berman. No questions.

Mr. DeWine. May I ask one more?

Mr. Kastenmeier. The gentleman from Ohio?

Mr. DeWine. Thank you, Mr. Chairman.

Mr. Mooney, I have one additional question. The thing that infuriates my constituents who are dish owners, more than anything that I can tell you, anything that I can imagine, is the fact that if they elect to purchase from HBO directly, that in some cases, in some areas, at least, your local cable companies get, what they refer to, as a kick-back. Is that practice still continuing, and what is your industries intent in regard to that?

It is very hard, frankly, for me to justify to my constituents that practice. They point out very correctly that they have invested anywhere now between $1,500 and if they bought a few years ago, $5,000, $6,000, they have the investment.

Your cable folks wouldn't even run your lines out to them; refused in many cases, said, we will never get out to you, you live in a rural area, we simply cannot afford to do it. They went out and purchased the dish, invested the money, and now your folks get a kickback because of some sort of territorial sovereignty; can you comment on that.

Mr. Mooney. This is what some people call the kickback, and what HBO calls the brand utilization discount, or BUD.

Mr. DeWine. Well, terminology is always important; we find that out in Congress, how we label bills.

Mr. Mooney. The question is, it seems to me that the relevant question here is not whether the cable operator was doing anything for the dish owner with respect to the $5, but whether the cable operator is doing anything for HBO with respect to the $5; that is the question.

The so-called brand utilization discounts are not peculiar to this industry or to this situation. They are used in a number of other industries. And the idea is for the middle man to compensate his principal distributor, in this instance, the cable operator, for the accumulated services that distributor has provided to the brand product, in terms of promotion and essentially taking that product over a period of years and making it into something. It is done all the time in the soft drink industry.

I think that it is something which properly is within the discretion of HBO to decide whether it wants to it or whether it doesn't want to do. And my position also is that it is essentially none of the trade association's business.

When trade associations begin to get involved in issue like that they get into a lot of trouble with the antitrust division. I would say, in addition to that, as I had occasion to last week in front of a committee of the other body, that we are quite aware, I am quite aware, that up here are a lot of people who look at that arrangement querulously and I am not necessarily taking the position that politically it is the smart thing to do; I am just saying I believe it to be properly and lawfully within in the discretion of HBO.

Mr. DeWine. Mr. Mooney, I just hope your people are making a lot of money on it, because you are getting a lot of heat for it. It is hurting you very deeply; and it is hurting you with this Congress.

Mr. Mooney. We are making very little.

Mr. DeWine. Then you ought to stop it. You ought to get out of it.

Mr. Coble. Mr. Chairman, I don't want to prolong this, but may I have one more question.

Mr. Kastenmeier. The gentleman from North Carolina.

Mr. Coble. Thank you, sir, I will be brief.

This question may be more appropriately directed to the next witness, Mr. Mooney, but I would be happy to hear what you have to say about it.

Are local TV broadcasters, whose signals are being taken or intercepted without their permission, WOR in New York, WGN in Chicago, for example, are they supporting this legislation; or do you know?

Mr. Mooney. I don't know.

Mr. Kastenmeier. Thank you, Mr. Mooney.

The final witness is Mr. Preston Padden, president, Association of Independent Television Stations, Inc. The association represents more than 200 independent television stations that serve communities across this country. Although Mr. Padden is new, relatively new at any rate in his job, he certainly has rapidly gained the respect of this subcommittee.

We have your nine page statement, Mr. Padden. If you care to summarize it you may otherwise proceed as you wish.

STATEMENT OF PRESTON PADDEN, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

Mr. Padden. Thank you, sir. I would like to submit the written statement for the record.

I would also like to submit for the record a copy of this typical television station program license agreement. I have got multiple copies I would be happy to share with the subcommittee.

Mr. Kastenmeier. Without objection, they both will be received.

Mr. Padden. Thank you.

Mr. Chairman, the first three pages of my written testimony established three main points. First, that independent stations must negotiate in the free market for license agreements for all of the programs which we broadcast.

Second, that we contract for exclusive rights to our programs.

Third, that we pay an absolute fortune for those program rights. I won't go through all of the details in that portion of the testimony.

In our view, absent some compelling public interest to the contrary, the copyright laws should respect and honor contracts licensing use of creative works. At the present our copyright laws do not honor and respect the very expensive program license agreements entered into by local television stations because of the cable television compulsory license and the absence of FCC exclusivity rules.

Unfortunately, from our perspective H.R. 5126 would only make things worse. It would vest another party, the satellite carrier, with yet another compulsory license to exhibit in our markets the very same programs for which we had paid more than $1 million per episode, for exclusive licenses.

Stated another way H.R. 5126 would deny our program license contract the respect and enforcement rights normally available under the copyright laws. It would authorize someone else to exhibit the programs we have purchased exclusively.

Confronted with this, we must ask ourselves why? What is the compelling public interest which requires the Congress to wade into the marketplace and withhold from our contracts the protections normally available under the copyright laws? Our understanding of the perceived need for this legislation is as follows:

First, published reports indicated that the cable industry has strongly urged cable program services including superstation carriers to scramble their satellite transmissions so that dish owners could not freely intercept those program services.

Second, congressional sentiment appears to favor the availability of a reasonable marketing plan to license scrambled program services to dish owners.

Third, under the Copyright Act of 1976 and/or marketing the superstations signals could cause the carriers to lose the exemption they presently enjoy under Section 1111(a)(3).

In our view, the superstation carriers are not now and never have been passive carriers. They are program distributors, who select the programming they distribute and who should pay fully for copyright just like our local stations.

All it takes is a glance at their many ads in the cable trade press to see that the superstation carriers are selling programming. It may sound a little old fashioned, but we think that people who want to beam programs up to a satellite for sale to others should first acquire some rights in those programs, then they would be free to scramble and market their service as they wish.

We recognize that full copyright liability for superstation carriers probably will not be achieved over night. For that reason, we want to offer this subcommittee a constructive, and we hope, helpful suggestion for immediate implementation in the interim.

In our judgment the short-term answer to this dilemma, is simply not to scramble the superstations. In our view, the present wording of section 1111(a)(3) of the Copyright Act, is sufficient to preclude scrambling by exempt passive carriers. To the extent that further clarifying language is deemed to be required, Congress should amend the act.

The bottom-line effect of scrambling a superstation is to turn a free service into a pay service, and in our judgment that is hardly a public service benefit. There is no need or justification for scrambling the superstations signals. Unlike HBO and Showtime, the superstation are not original cable program services, which have purchased national program rights.

Unlike the feeds from the commercial networks or syndicators to local stations, these are not private communications. On the contrary, the superstations signal begins its life as a free broadcast to the general public. That broadcast is then picked up without the consent of the local station.

Historically, the satellite carriers have defended their pickup of the superstations signal on the theory that the broadcaster has hurled his signal into the air for reception by anyone with an adequate receiver. But it is interesting to note that under the terms of their program license agreements, the local stations are forbidden from authorizing any satellite retransmission of their signal, and that provision appears in this typical contract we have asked to enter into the record.

Thus, the satellite carrier is making a use of the station's signal which the station itself would be forbidden to undertake. We find that strange, that the owner is forbidden what is allowed to a nonowner. We find that a most curious approach to property rights.

It cannot be seriously argued that scrambling is necessary to prevent theft from a carrier that has never owned a signal in the first place. The mind boggles at the suggestion that the carrier, having plucked the signal out of air is now free to convert that signal to its ownership, to scramble what the carrier doesn't even own, to prevent others from stealing it from him.

To paraphrase Robert Penn Warren, our first national poet laureate, you cannot be robbed of what you have never owned.

In closing, I would like to note that our friends at the networks have discussed a possible amendment to H.R. 5126, which would limit the definition of superstations to independent as opposed to network stations. Clearly, they do not want their exclusive programming to be grabbed by some third-party interloper and hurled around the country by satellite.

But in our view, it is equally wrong for any program, network, syndicated, or locally originated to be distributed and sold by a party operating outside of our copyright system.

It would be unfair and discriminatory to enact a bill which would trample upon the program rights of local independent stations, while preserving the program rights of local network affiliates.

The long-term solution to this issue is to require the superstation carriers to acquire in the free market the program rights necessary for their activities. The short-term answer simply is to withhold the exemption in section 111(A)(3) from any carrier who chooses to scramble.

Thank you very much.

[The statement of Mr. Padden and the program license agreement follow:]

TESTIMONY OF

PRESTON R. PADDEN

PRESIDENT

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

BEFORE THE

SUBCOMITTEEE ON COURTS, CIVIL LIBERTIES AND THE
ADMINISTRATION OF JUSTICE; COMMITTEE ON THE JUDICIARY;
UNITED STATES HOUSE OF REPRESENTATIVES

AUGUST 7, 1986

Thank you, Mr. Chairman. My name is Preston Padden and I am President of the Association of Independent Television Stations, Inc., commonly known as INTV. I appreciate this opportunity to present our views on H.R. 5126.

INTV represents more than 150 Independent Television stations across the nation. Our member stations range in size from very small start-up local Independent UHF stations to large major-market VHF Independents, including passive superstations.

I would like to begin by introducing into the record of this hearing, this contract, which is a typical television station program license agreement, entered into between Viacom Enterprises and Tulsa 23. This agreement provides for the exclusive licensing of the program, "Perry Mason" to station KOKI-TV in the Tulsa, Oklahoma market. This contract is a rather ordinary exclusive licensing agreement, virtually standard in every sector of the entertainment business. By signing this agreement, the copyright owner grants an exclusive license to station KOKI-TV to exhibit and otherwise commercially exploit this program in the Tulsa market area. Contracts exactly like this one are the backbone of the Independent television station business. Our stations must negotiate rights agreements in the free marketplace for every single episode of every single series, which they broadcast throughout the day.

Independent stations pay a fortune for their program rights. In fact, program costs are the single biggest expense in the operation of a station today. The Independent must either produce its own program or purchase programs for every minute that it is on the air.

According to a survey conducted by Butterfield Communications for VIEW magazine, the cost of off-network half hour series on Independent stations went up 51% between 1981 and 1984 and then rose another 42% in 1985. The cost of feature films, which are often a staple of Independent station programming, went up 25% between 1981 and 1984 and then spurted a dramatic 45% in 1985, alone.

Over all, local TV stations paid program syndicators an estimated $2.65 billion for program rights in 1985. A few specific examples drawn from trade reports will illustrate just how dearly local stations must pay for their exclusive program license agreements. Local stations have paid or are expected to pay more than 1 million dollars per episode for exclusive licenses for "The Fall Guy", for "Magnum P.I.", for "Webster", for "Cheers", for "Night Court" and for "Growing Pains" among others. Estimates of syndication revenues for "The Bill Cosby Show" range as high as 3 million dollars per episode.

We used to think that prices would go down as the programs got older. However, this may not be true any longer. Local stations are paying record prices for even older series. For example, after "M*A*S*H" completed it first full cycle of re-runs, the syndicator re-sold renewal rights to U.S. stations for another $900,000 per episode -- almost triple the price of the original syndication run.

From another angle, the point of view of the individual station, View magazine reported that re-runs of "Hill Street Blues" can be had in Miami for $17,000 per episode, compared with $37,000 for "Magnum P.I." in the same city. Of course, if you want to buy "Magnum P.I." for the nation's number two market, Los Angeles, you'll have to pay more. View magazine puts the Los Angeles price for just one episode of "Magnum" at $120,000. The same publication notes that a single episode of the half-hour situation comedy, "The Facts of Life" brought $60,000 in Los Angeles and $57,000 in New York.

You may ask what our high program prices have to do with H.R. 5126. The answer is plenty. H.R. 5126 would grant other parties a compulsory license to sell and exhibit in our markets the very same programs which we have purchased on an exclusive basis. We don't think that's fair. And, we don't think it's appropriate copyright policy.

Our program license agreements represent our national copyright system at work. The fundamental purpose of our copyright laws is to stimulate the creation of intellectual property by assuring that ownership rights, and contracts governing the licensing of those rights, are respected. Absent some compelling public interest to the contrary, our copyright laws should respect and honor contracts licensing the use of creative works.

At the present time, our copyright laws do not honor and respect the very expensive program license agreements entered into by local television stations -- a situation which cries out for redress. Unfortunately, from our perspective, H.R. 5126 would only make things worse.

In 1976, Congress conferred upon the fledgling cable television industry, a compulsory license to re-transmit programs broadcast by television stations. At the time, the FCC maintained rules, which required cable re-transmissions to respect and honor exclusive license agreements negotiated and paid for by local stations. Obviously, it is one thing to grant an industry a compulsory license and quite another thing to provide that such a compulsory license should override and supercede licenses negotiated and paid for in the free market by parties that have not been blessed with compulsory licenses.

Today, the FCC exclusivity rules are gone, and local station exclusive program licenses are now violated daily by cable exhibitions of the same programs under the compulsory license. Simply stated, cable's compulsory license now overrides our exclusive negotiated license.

Because of an agreement we have reached with the cable industry (and only because of that agreement), we are not before you today asking that the cable compulsory license be repealed. However, we do hope to restore the principle that a governmentally conferred compulsory license should yield in the face of a conflicting exclusive license negotiated and paid for in the free market.

H.R. 5126 would move us in the wrong direction. It would vest another party, the satellite carrier, with yet another compulsory license to exhibit in our markets the very same programs for which we pay more than 1 million dollars an episode for exclusive licenses. H.R. 5126 would deny our program license contracts the respect and enforcement rights normally available under the copyright laws. It would authorize someone else to exhibit the programs we have purchased exclusively.

We must ask why? What is the compelling public interest which requires the Congress to wade into the marketplace and withhold from our contracts the protections of the copyright laws?

Our understanding of the perceived need for this legislation is as follows:

1) published reports indicate that the cable industry strongly urged cable program services, including superstation carriers, to scramble their satellite transmissions so that dish owners could not freely intercept these program services. (Apparently, cable's thinking is that if potential dish owners not only had to buy the dish, but a de-scrambler and pay for satellite programming as well, few would opt to do so if they lived in an area served by cable.)

2) Congressional sentiment appears to favor the availability of a reasonable marketing plan to license scrambled program services to dish owners; and

3) under the Copyright Act of 1976, scrambling and/or marketing the superstation signals could cause the carriers to lose the exemption they presently enjoy under Sec. 111(a)(3).

In our view, the superstation carriers are not, and never have been, passive carriers. They are program distributors who select the programming they distribute and should pay fully for copyright, just like local stations. All it takes is a glance at one of their many ads in the cable trade press to see that the superstation carriers are selling programming. It may sound a little old-fashioned, but we think that people who want to beam programs up to a satellite for sale to others should first acquire the rights to those programs. Then they would be free to scramble and market their service as they wish.

We recognize that full copyright liability for superstation carriers probably cannot be achieved overnight. For that reason, we also want to offer the Subcommittee a constructive and helpful suggestion for immediate implementation in the interim. In our judgement, the short term answer to this dilemma is simply not to scramble the superstations. In our view, the present wording of Sec. 111(a)(3) of the Copyright Act is sufficient to preclude scrambling by exempt passive carriers. To the extent that further clarifying language is deemed to be required, Congress should amend the Act.

The bottom line effect of scrambling a superstation is to turn a free service into a pay service -- hardly a public interest benefit. There is no need, or justification, for scrambling the superstation signals. Unlike HBO and ShowTime, the superstations are not original cable program services which have purchased national program rights. And, unlike the feeds from the commercial networks or syndicators to local stations, these are not private point-to-multi-point communications.

To the contrary, the superstation signal begins its life as a free broadcast to the general public. That broadcast is then picked up without the consent of the local station. Historically, the satellite carriers have defended their pick-up of the superstation signal on the theory that the broadcaster has hurled his signal into the air for reception by anyone with an adequate receiver. But, it is interesting to note that under the terms of their program license agreements, local stations are forbidden from authorizing any satellite re-transmission of their signal. Thus, the satellite carrier is making a use of the station's signal which the station itself would be forbidden to undertake.

It cannot be seriously argued that scrambling is necessary to prevent theft from a carrier that has never owned the signal in the first place. The mind boggles at the suggestion that the carrier, having plucked a signal out of the air, is now free to convert that signal to its ownership -- to scramble what the carrier doesn't even own to prevent others from stealing it from him. To paraphrase Robert Penn Warren, you cannot be robbed of what you have never owned.

In closing I would like to point out an irony in the current structure of the copyright status of various communications media. The over-the-air broadcasters, who provide a free service to the American people, are required to negotiate, contract for and purchase program rights. On the other side of the coin, cable TV systems and satellite carriers, which charge the American people for their services, are favored under the copyright law with a compulsory license -- a free ride -- for the programs which they exhibit. A convincing public interest argument can be made that this situation might well be reversed. Logically, the structure of the copyright laws should favor those that provide the public with a free service and disfavor those that exact a price from the public to see programs.

Mr. Chairman, I would add only that we were reluctant to appear here in opposition to H.R. 5126 and the sole reason for this reluctance stems not from any doubt about our position but from the great personal and professional respect we hold for you. We thank you for the opportunity to present our views.

VIACOM ENTERPRISES

A DIVISION OF VIACOM INTERNATIONAL INC.

Checked: O.K.
WCS QW 10-10-85

PROGRAM LICENSE AGREEMENT

No. 05-4523

AGREEMENT made this 3rd day of September, 1985 by and between VIACOM ENTERPRISES, 1211 Ave. of the Americas, New York, N.Y. 10036 (herein called "Viacom") and
TULSA 23
7422 E. 46th Place
Tulsa, OK 74145
(herein called "Licensee").

Viacom hereby grants to Licensee and Licensee hereby accepts, a license to make the following local television broadcasts during the term hereof in accordance with the provisions set forth herein and in the Terms and Conditions on pages 2 through 4 attached hereto and hereby made a part hereof:

I. PROGRAM SERIES: PERRY MASON

II. NUMBER OF PROGRAMS: 195

III. NUMBER OF BROADCASTS OF EACH PROGRAM: 1

IV. FREQUENCY OF BROADCASTS: not more than broadcasts per week.

V. STATION: KOKI-TV VI. CITY: TULSA, OKLAHOMA

VII. METHOD OF BROADCAST: Black & White Film

VIII. OTHER LIMITATIONS:

IX. STARTING DATE: SEPTEMBER 25, 1985

X. TERM: TWO YEARS

XI. NET LICENSE FEE: , payable in 12 consecutive monthly installments of 1 @ and 11 each, commencing on the first day of October, 1985.

Please make check payable to Viacom Enterprises, indicating program title and date of the installment covered by the remittance on the check stub or attachment thereto. This information is necessary in order for Viacom Enterprises to properly discharge its obligation with the producer of the program.

PRINTS TO BE DELIVERED TO:
KOKI-TV
7422 E. 46th Place
Tulsa, OK 74145

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

TULSA 23
By
(Licensee)
JAMES U. LAVENSTEIN, GEN. MGR.

VIACOM ENTERPRISES
By

TERMS AND CONDITIONS

1. **RIGHTS.** (a) VIACOM hereby grants to Licensee and Licensee hereby accepts a limited license of the right to make television broadcasts of the particular programs specified on Page 1. Each program shall be broadcast only to non-paying audiences, only over the facilities of the television broadcast station specified in paragraph V hereof and only by transmission from the originating and existing transmitter and antenna of said television broadcast station. Licensee will not transmit or broadcast, or authorize the transmission or broadcast of any of the programs by means of cable television systems, microwave systems, boosters, translators or satellites or other similar devices, and will not charge or collect any money, service, or valuable consideration from any party who transmits or broadcasts any of the programs by means of cable television systems, microwave systems, boosters, translators or satellites or other similar devices.

(b) In the event a telecast of any program licensed hereunder is, with or without Licensee's authorization, amplified, retransmitted or relayed on the same or any other frequency by any satellite, translator or booster station, community antenna or any other device or method not authorized herein for reception outside the "specified zone" of the community to which the station is licensed (as said term is defined in Rule 76.5(f) of the FCC), VIACOM shall have the right, in its absolute discretion, to terminate this Agreement in accordance with the termination provisions as set forth in paragraph 5 and said event shall constitute a "termination event" in accordance with the provisions of the aforesaid paragraph.

2. **USE OF PRINTS AND PROGRAMS.** Licensee shall not make, authorize or permit any use of the "prints" (as hereinafter defined) or programs other than as specified on page 1 hereof, including, without in any way being limited to, copying, duplicating, or sublicensing the use of, any program, print, or portion thereof, or authorizing or permitting the exhibition, whether by way of television broadcasting or otherwise, of any program, print, or portion thereof, in any theater, auditorium or other place to which an admission fee is charged, or doing anything which may impair the copyright in any program or portion thereof, or VIACOM's title to the print thereof.

3. **PAYMENT.** Licensee will pay VIACOM (in U.S. dollars at New York City) the Net License Fee specified in paragraph VIII hereof, in installments as provided therein. No failure of Licensee, for any reason, to make any broadcast hereunder will reduce the Net License Fee, except as may be expressly provided herein.

4. **DELIVERY AND RETURN OF PRINTS.** (a) VIACOM will deliver to Licensee, at the address specified on page 1 hereof, collect, one (1) positive 16 mm. print and the sound track forming a part thereof (herein together collectively called the "prints" and individually called a "print") of each of the programs, in such sequence as VIACOM may determine. Each print shall be in color or black-and-white, as determined by VIACOM, but no broadcast hereunder shall be in color unless expressly so provided on page 1 hereof. The programs shall be broadcast in the sequence in which the prints thereof are delivered to Licensee by VIACOM (or, if more than one print is delivered in a single package, as specified by VIACOM). Delivery of the prints by VIACOM to Licensee, Licensee's agent or a common carrier shall be deemed to be delivered by VIACOM to Licensee hereunder. If deliveries are made to a common carrier, they shall be made in time normally sufficient for prints to reach their destination at least two (2) business days prior to the date of the scheduled broadcast thereof. In the event that any print has not reached its destination at least two (2) business days prior to the date of the scheduled broadcast thereof, Licensee shall immediately notify VIACOM by telegram. If Licensee so notifies VIACOM and VIACOM shall not deliver to Licensee, prepaid, a replacement print of the same program, or another program in the Program Series, or a program acceptable to Licensee in another program series, in time for the scheduled broadcast, such broadcast shall be deemed an eliminated broadcast.

(b) Licensee will examine each print immediately upon receipt thereof and will immediately notify VIACOM by telegram if such print is defective for broadcasting by customary industry standards, or is otherwise not in accordance with the provisions of this Agreement. If Licensee so notifies VIACOM and VIACOM shall not deliver to Licensee, prepaid, a replacement print of the same program, or another program in the Program Series, or a program acceptable to Licensee in another program series, in time for the scheduled broadcast, such broadcast shall be deemed an eliminated broadcast. Failure of Licensee to give VIACOM such notice with respect to any print within four (4) weeks after Licensee's receipt thereof shall be deemed Licensee's irrevocable acknowledgement that such print is satisfactory in all respects.

(c) Licensee will return each print, prepaid by an air freight firm substantially in the same condition as received by Licensee, normal wear and tear excepted, to Viacom Enterprises, 535 West 46th Street, New York, New York 10036, or to such address as Viacom may specify to Licensee excluding Sundays and holidays after the broadcast thereof or immediately upon termination or suspension of this Agreement. Delivery of the prints by Licensee to Viacom, Viacom's agent or specified addressee, or a common carrier shall be deemed to be delivered by Licensee to Viacom hereunder.

5. **TERMINATION.** (a) If Licensee fails or refuses to perform any of Licensee's obligations hereunder, or if at any time a voluntary petition in bankruptcy shall be filed by Licensee, or if at any time an involuntary petition in bankruptcy shall be filed against Licensee and shall not be dismissed within thirty (30) days thereafter, or if Licensee shall take advantage of any insolvency law, or if a receiver or trustee of any of Licensee's property shall be appointed at any time and such appointment shall not be vacated within thirty (30) days thereafter (which events are herein individually called a "termination event" and collectively called "termination events"), then, in addition to any other rights of whatsoever nature VIACOM may have at law or in equity, at the option of VIACOM exercisable upon notice given to Licensee, all installments of the Net License Fee then due, or to become due, to VIACOM hereunder shall become immediately due and payable. During the continuance of any termination event, VIACOM may, at its option, suspend the delivery of prints hereunder, and, whether or not VIACOM shall have exercised such suspension right, terminate this Agreement effective at any time by giving notice to Licensee on or before the effective date of such termination; provided, however, that in the event that Licensee pays all such installments of the Net License Fee immediately after exercise of such suspension right, VIACOM may not thereafter terminate this Agreement pursuant to this subparagraph (a) (unless such termination event involved any failure or refusal to perform other than non-payment of installments of the Net License Fee), and, if VIACOM shall have suspended this Agreement as provided in this subparagraph (a), such suspension shall automatically terminate effective on the date upon which VIACOM receives such payment. Regardless of the occurrence of any termination event, or failure by Licensee to make payment to VIACOM hereunder, VIACOM may, if it so elects, continue to deliver prints to Licensee without waiving any of the rights granted to VIACOM in this subparagraph (a). No termination or suspension of this Agreement as provided in this subparagraph (a) shall affect VIACOM's right to the payment of all installments of the Net License Fee as provided in this subparagraph (a).

(b) If the rights secured by VIACOM for the Program Series are cancelled or voided for any reason other than the fault of VIACOM, this Agreement shall automatically terminate effective simultaneously therewith.

6. **WITHDRAWAL.** In the event that VIACOM shall deem it necessary or advisable to withdraw any program from license due to any question concerning any right therein or any claim with respect thereto, VIACOM shall notify Licensee thereof and Licensee's license shall be deemed revoked thereby with respect to such program; in such event, if a print has been shipped to Licensee, Licensee will promtply return it to VIACOM, collect, or, if a print has not been shipped to Licensee, VIACOM shall not be obligated to deliver a print of such program, or any substitute therefor, to Licensee, and the remaining number of broadcasts of such program specified on page 1 hereof shall be deemed eliminated broadcasts, unless a substitute program in the Program Series, or a substitute program acceptable to Licensee in another program series, is furnished to Licensee hereunder. Any such withdrawal shall not constitute a breach of this Agreement.

7. **LOSS OR DAMAGE.** Licensee shall immediately report to VIACOM any loss, theft, destruction or damage to any print or part thereof occurring between the time of receipt thereof by Licensee and the delivery thereof by Licensee as provided in subparagraph (c) of paragraph 4 hereof, and Licensee shall pay VIACOM a sum equal to the cost of making a new print thereof. Licensee shall not acquire any rights with respect to any print by virtue of any payment made pursuant to this paragraph 7.

8. EDITING. Licensee shall not cut, modify, alter or edit any print except to make necessary repairs. This restriction shall not apply to the insertion of commercial material; provided, however, that if commercial material is inserted in any print, Licensee shall, prior to return, restore such print to the condition in which it was delivered. Licensee shall not delete the copyright notice from any print. Licensee shall not delete the talent, writing, producing or directing credits from any print, but any failure to broadcast credits due to unexpected lack of time, failure of technical or mechanical facilities or other cause of a similar nature beyond Licensee's control, shall not constitute a breach of this Agreement.

9. INDEMNITY. (a) VIACOM will indemnify and hold Licensee harmless from and against any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees, arising from the broadcasting of any material contained in the programs; provided, however, that Licensee shall promptly notify VIACOM of any claim or litigation to which the indemnity set forth in this subparagraph (a) applies and that VIACOM's obligations with respect to any settlement shall be limited to the amount approved by VIACOM, and that at VIACOM's option, VIACOM may assume the defense of any such claim or litigation, in which event VIACOM's obligations with respect thereto shall be limited to the payment of any judgment, or settlement approved by VIACOM, in connection therewith.

(b) Licensee will indemnify and hold VIACOM harmless from and against any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees, arising from the broadcasting of any material, other than the material contained in the programs, which Licensee may broadcast or authorize to be broadcast in connection with the programs; provided, however, that VIACOM shall promptly notify Licensee of any claim or litigation to which the indemnity set forth in this subparagraph (b) applies.

10. LOCAL LAWS. While VIACOM is of the opinion that governmental agencies are without jurisdiction to require a television broadcaster to secure a license to broadcast any motion picture by television, it is understood that VIACOM does not make any representations or undertake any obligations with respect to the procurement of any such license.

11. TAXES. Licensee will pay all sales taxes or other taxes or charges imposed upon Licensee or VIACOM by any law, ordinance or requirement of any governmental body in connection with the licensing, delivery, broadcasting, possession or use, as herein provided, of any of the prints or programs, or any portion thereof.

12. NON-PERFORMANCE. If VIACOM fails to deliver a print for any broadcast in accordance with VIACOM'S obligations hereunder because of "force majeure" (i.e., act of God; inevitable accident; fire; lockout, strike or labor dispute; riot or civil commotion; act of public enemy; enactment, rule, order or act of government or governmental authority [whether federal, state or local]) transportation failure or delay, or other cause of a similar or different nature beyond VIACOM'S control, or because of nonproduction for any of the above reasons of any program as yet unproduced, or if Licensee is unable to broadcast any program on the day and hour specified herein because of force majeure, failure of technical facilities, or for other cause of a similar nature beyond Licensee's control, or because of the recapture of the broadcast time period for the purpose of broadcasting on a sustaining basis an event of public importance, the term of this Agreement shall be automatically extended for one (1) week with respect to each week of broadcasting so prevented or omitted; provided, however, that the term of this Agreement shall not in any event be extended for more than an aggregate period of four (4) weeks pursuant to this paragraph 12.

13. ASSIGNMENT. Licensee shall not assign this Agreement in whole or in part to any third party without the prior written consent of VIACOM. VIACOM may assign its rights hereunder in whole or in part to any person, firm or corporation; provided, however, that no such assignment shall relieve VIACOM of any of its obligations hereunder.

14. SALE OR TRANSFER OF ASSETS. Licensee shall notify VIACOM of any sale or transfer of all or substantially all of its assets to any third party. In the event of any such sale or transfer, all installments of the Net License Fee then due, or to become due, to VIACOM hereunder shall become immediately due and payable. The foregoing shall not however apply in the event of an assignment pursuant to the provisions of paragraph 13.

15. MUSIC. With respect to each musical composition contained in the programs, VIACOM warrants and represents that the performing rights in and to such musical composition are

(i) available for license through American Society of Composers, Authors and Publishers (ASCAP),
 Broadcast Music, Inc. (BMI), or SESAC, Inc., or
(ii) in the public domain, or
(iii) controlled by VIACOM to the extent necessary to permit the broadcasts hereunder.

Licensee shall, at the sole cost and expense of Licensee, secure all performing rights licenses necessary for the broadcasting of each musical composition contained in each program, the performing rights to which fall within subdivision (i) of this paragraph 15 (which rights shall not be deemed to be included in VIACOM'S indemnification undertaking pursuant to subparagraph (a) of paragraph 9 hereof). VIACOM shall, at the request of Licensee, furnish Licensee with the following information with respect to each musical composition contained in each program: name or other identification; composer (if known); publisher (if any).

16. OWNERSHIP. All rights and title in and to the programs and program series, including but not limited to, prints thereof and the title or titles, names, stories, plots, incidents, ideas, formulas, formats, general content of the programs and any other literary, musical, artistic or creative material included therein (other than material in the public domain) shall, as between VIACOM and Licensee, remain vested in VIACOM.

17. GENERAL. (a) The titles of the paragraphs of this Agreement are for convenience only and shall not in any way affect the interpretation of any paragraph of this Agreement or of the Agreement itself.

(b) A waiver by either party of any of the terms or conditions of this Agreement in any instance shall not be deemed or construed to be a waiver of such term or condition for the future, or of any subsequent breach thereof. All remedies, rights, undertakings, obligations and agreements contained in this Agreement shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party.

(c) All notices required to be given hereunder shall be given in writing either by personal delivery, by mail or by telegraph (except as herein otherwise expressly provided) at the respective addresses of the parties hereto hereinabove set forth, or such other addresses as may be designated in writing by either party. Notice given by mail or by telegraph shall be deemed given on the date of mailing thereof or of delivery of such telegram to a telegraph office, charges prepaid or to be billed.

(d) This Agreement and all matters or issues collateral thereto shall be governed by the laws of the State of New York applicable to contracts performed entirely therein.

(e) This Agreement constitutes the entire agreement between Licensee and VIACOM with respect to the subject matter herein contained, and this Agreement cannot be changed or terminated orally.

(f) If any provision of this Agreement, as applied to either party or to any circumstance, shall be adjudged by a court to be void or unenforceable, the same shall in no way affect any other provision of this Agreement, or the validity or enforceability of this Agreement.

18. Viacom and Licensee mutually agree that:

(a) All references to "prints" shall be deemed to include video tape recordings ("VTR");

(b) Notwithstanding anything to the contrary in paragraph 8 no cuts whatsoever shall be made in any "VTR" and all commercial billboards or announcements and all promotional, advertising, and any other non-program material shall be "rolled-in."

(c) Licensee shall not erase or degauss any "VTR";

(d) Licensee shall not re-record any program or segment thereof;

(e) All "VTR's" to be delivered to Licensee hereunder shall be high/low band;

(f) Notwithstanding anything to the contrary in paragraph 4, Licensee shall accept delivery of each "VTR" by air collect, and Licensee shall reship each "VTR" air collect as instructed by Viacom.

19. WITHDRAWAL OF PROGRAMS. VIACOM shall have the right to withdraw any programs in the event 15% or less of the total number of broadcasts licensed (the number of programs licensed hereunder) have not been broadcast. The provisions of paragraph 6 above shall apply to any such withdrawn programs.

20. REPORTING. Licensee agrees to furnish VIACOM on or before the tenth day of each calendar quarter of the licensed term with a report of the playdates of each program exhibited. A copy of each such report shall be sent to the SCREEN ACTORS GUILD, INC. ("SAG"), 7750 Sunset Blvd., Hollywood, California 90046.

Checked: O.K.
WCS QW 10-10-85

PERRY MASON	September 3, 1985
PROGRAM	DATE

EXCLUSIVITY

Viacom will not license any program licensed for broadcast hereunder to be broadcast during the term of this Agreement which commences 9/25/85 and terminates 9/24/87 by any television station (other than the Station) licensed to a community within 35 miles of Station's community or to another designated community in a hyphenated market as specified in § 76.51 of the Rules and Regulations of the FCC for those 100 markets listed, or for those markets not listed in § 76.51, the ARB Television Market Analysis for the most recent years; not to any cable television system operating in a community located in whole or in part within the major television market within which the designated community of the Station is located.

VIACOM ENTERPRISES

By: ______________________

KOKI-TV
STATION

By: ______________________
JAMES U. LAVENSTEIN, GEN. MGR.

8/19/81

Mr. **Kastenmeier**. You argue that the present wording of 111(A)(3) of the Copyright Act, is sufficient to preclude scrambling by exempt passive carriers. You heard Ed Taylor testify that EMI is currently scrambling; United Video and Southern Satellite will scramble soon.

It would appear to me that recent judicial decisions are against you on this point. Can you cite any legal authority for your position?

Mr. **Padden**. No, I readily acknowledge that the cases directly on point have gone the other way. Our argument simply stems from the fact that as we understand the exemption, it was intended for passive carriers who provide only transmission capacity and do not play any selection role in the intelligence that is transmitted through their carriers.

In fact, I believe, it was originally to cover the AT&T companies, and it was originally suggested by Professor Darinburg.

In our judgment, if you look at the cable magazine ads, and you see the advertisements that these satellite superstation carriers take out, what they are selling is the program assets of the station whose signal they have intercepted. In our view that is equivalent to the telephone company taking out an ad to tell you what wonderful calls they have coming your way.

We just don't think they fit the definition of a passive carrier. And certainly to the extent that they then scramble the signal and retail it to people as I believe Mr. Mooney indicated, I think their ability to continue to come within that exemption becomes even more tenuous.

Mr. **Kastenmeier**. You represent a number of members, broadcasters; you also represent, of course, WOR, WGN, PIX, and WKTV——

Mr. **Padden**. KNT, in Dallas; yes.

Mr. **Kastenmeier**. Do they agree with your testimony on this issue?

Mr. **Padden**. I shared draft copies of my testimony with them in advance. I can tell you that it is my impression that none of those stations is overly anxious to see their signals scrambled.

In fact, they are already receiving hate mail from people who don't understand this rather bazaar system that has evolved and lots of dish people believe that it is the originating station that is behind the impending scrambling. I do not speak for them specifically on this bill and I would have to direct you to their representative.

Mr. **Kastenmeier**. Not if that view, certainly. If their view is that outside of their market area, if they object to their signal being scrambled, then they are anticipating something other, in terms of reaching people other than their normal market area as a television station.

Mr. **Padden**. The point I meant to make was that they are not the initiating force in this scrambling of this signal. They are certainly not here before you saying "Please, amend the copyright laws so that we can scramble, so that somebody else can scramble our signal."

Mr. **Kastenmeier**. You argue about the marketplace and the very high cost to your stations of obtaining programming. Couldn't you argue that if this becomes law, and even, in a sense, if it isn't enacted, and that programming is available via a superstation in the same area as your other independents are operating, that they should contract to pay less, rather than $1 million an episode, something less than since there is already some penetration by that or similar programming in that area through other means, that is to say satellite?

Mr. **Padden**. I think whenever our people are sitting down with program distributors they always argue that they should contract to pay less of the programming they have to buy. I am not very optimistic that that would be the result; that they would obtain the marketplace.

Our bottom line is that we really operate within the copyright laws; and we are facing competition from a lot of new media. And we are perfectly prepared to stand toe-to-toe with those new media, if they purchase their programs and we purchase some programs, and then we will compete with each other.

What we find most distressing is that every new technology that comes along lines up with compulsory license so that it will be spared the rigors of negotiating in the program marketplace that our members have to go through. We don't understand why our contracts are not entitled to the respect and the protections normally available under the copyright law.

Mr. **Kastenmeier**. That is an old issue that the FCC decided against you since some years back in terms of——

Mr. **Padden**. Well, I can report to you that this morning the FCC announced, among other things, that they intend to initiate a notice of inquiry proceeding into the subject of syndicated exclusivity rules. And certainly it is our view that it was a mistake to repeal those rules.

Mr. **Kastenmeier**. Thank you, Mr. Padden.

I yield to the gentleman from Ohio.

Mr. **DeWine**. To follow up on our chairman's questioning, Mr. Padden, when your folks sit down to negotiate the purchase price of these programs, is the penetration of one of the superstations, is that figure available? In other words, do you know what the penetration is in your particular market of that superstation?

In other words, the chairman's argument was that you should be able to figure out how much that "I Love Lucy" is, or whatever you are buying is, because that same program is coming in through the superstation?

I guess my question is do you know how much penetration there is from the superstation, can that be obtained?

Mr. **Padden**. I am sure that information can be obtained. Part of the problem is, I believe, the price principally reflects local competitive pressures among media operating in that market, number one.

Number two, it often is not known when you are sitting down to license a piece of program product whether that same program is going to be licensed to a station which has been picked up by one of these carriers and turned into a superstation. And, indeed, even if the program you license is not currently under license to a superstation, it may be under license to a station that is going to become a superstation tomorrow.

I believe that you heard testimony here today that the carriers look to the future to create more superstations. So it is not a factor that can easily be taken into account in the local negotiations; because, precisely because all of this superstation carrier activity is happening wholly outside of the copyright system.

Mr. **DeWine**. I appreciate your testimony this morning. I think that you have certainly hit upon one point that is correct. And if you had to devise a system that makes any logical sense you certainly wouldn't come up with the system that we have today.

Thank you very much.

Mr. **Kastenmeier**. The gentleman from Kentucky.

Mr. **Mazzoli**. Thank you, Mr. Chairman. I agree with my friend, Mr. DeWine, I thought your testimony was very interesting and it is a kind of breath of fresh air. It may be contrary to existing law and it may run counter to everything that has been decided so far, but it makes a hell of lot of sense, and it is kind of important.

Mr. **Padden**. Thank you very much.

Mr. **Mazzoli**. I think maybe we get ourselves so wrapped up and so tied up in knots that we tend to perpetuate the knots instead of trying to think of how we can untangle them and untie them. So, I think you have been a very big help.

Let me ask you this, Mr. Padden, and I will have to freely confess my ignorance on a lot of the subtleties of this whole subject. Each time I approach a hearing of our friend from Wisconsin, I have to go back to square one and kind of learn again.

Tell me in words that I can understand, how you see this bill to be a severe problem to the stations you represent, independent television?

Let me put it this way; because it seems to me if the superstations are scrambled, if the carrier is still given an exemption and permitted to scramble it might make that programming, which you find competitive with yours, less available because the backyard owner is going to have to pay for it; so then why, in some respects, would this be detrimental to you?

Mr. **Padden**. We certainly considered that argument in trying to decide upon a position that made sense and we hoped would be helpful. You certainly can make the argument that going from the current position of no liability, to some liability under compulsory license has the appearance on the surface of being progress toward a full liability situation.

However, in our judgment, it simply is a mistake for us to sit by and for the U.S. Congress to wade into the marketplace and confer upon other media a compulsory copyright licensing mechanism that is not available to us. And while the absence of scramble is our short-term solution, may, in fact, result in more widespread distribution of this product, at least we will not be establishing that another medium has a right from Congress to license the same programs that we went out and paid our hard-earned money to purchase on an exclusive basis in the marketplace.

Let me add, we are not asking Congress to pass a law that says we have the right to purchase exclusive programs. If we have a free marketplace, and the seller does not want to sell the local station an exclusive license, at a price the local station is willing to pay, and the seller wants to set it up so that he is going to sell to several different competitors, that is obviously a situation we would have to accept.

What we have great difficulty accepting is that when we pay what it takes in the marketplace to clear an exclusive license and then the Congress gives somebody else a compulsory license to exhibit the exact same program against us.

Mr. **Mazzoli**. It is interesting; so actually while possibly this bill could assist you in a sense of curtailing some of the easy availability of competitive programming or the similar programming, in the long run it would establish as a legal principle that there is another group of people, in this case carriers, who would then have, like cable systems have the opportunity of having a compulsory license, and that is really the underlying part of your fear.

Well, let me say that I am one who shares the concerns about compulsory license. I have said so in many fora over the years.

I do think that there is a lot to be said for allowing the marketplace, and this wouldn't mean some solo cable system, because there is consortiums of builders to build a large construction project when the one can't handle it. There are consortiums of bidders on different things, and there could be some kind of a consortium or grouping organizations to then compete with Hollywood. Because it could be that the individual company would have a heck of a time dickering with the large studios, but in unison with other ones they could.

Let me again thank you for the testimony. I think it was helpful in kind of looking at this thing from a slightly different perspective. There may be some questions I would have later, in which case I would send them, or call them into you.

Thank you, Mr. Mazzoli.

Mr. **Kastenmeier**. The gentleman from Virginia, Mr. Boucher?

Mr. **Boucher**. No questions.

Mr. **Kastenmeier**. The gentleman from North Carolina?

Mr. **Coble**. Thank you, Mr. Chairman.

Mr. Padden, I will put to the same question I put to your predecessor in the witness' chair. I think you touched on it but I am not sure I know it.

I am like my friend from Kentucky, tell me in language that I will understand. Our local TV broadcaster, WOR in New York, WGN in Chicago, whose signals are taken without their permission; what is their position on this proposed legislation, if you know?

Mr. **Padden**. I cannot speak for them specifically on this issue. I would urge you to direct these questions to their representatives. I will certainly pass along that you are interested in their position.

As I indicated I shared advanced copies of our testimony with them. They are in a very difficult position. To give you an understanding of the difficulty of their position, I can relate to you a situation that I went through personally, in a prior life, when I was with Metromedia, and we had a station in Los Angeles that carried the Dodger games.

All of a sudden an outfit called ASN came along and took out big trade ads in cable trade press saying, "Add the Dodgers station to your cable system. The Dodgers are a hot baseball team and everybody loves them, and your subscribers will love them."

And the Dodgers called our station and said, in effect, "What in the hell do you think you are doing? We gave you a local license for the Dodger games in Los Angeles, and now you are putting it out all over the country."

We said to them, "We didn't have anything to do with that. We didn't even know about it." And they said to us, "Come on, we weren't born yesterday, we know this couldn't happen without your participation."

So the use is being made of their signal that they are not in a position to control.

Mr. **Coble**. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. In taking up the gentleman's suggestion the committee will contact some of these passive stations.

It is my own observation that there have been times, I think in the past, where the relationship was almost hostile, but I don't think that is basically true anymore. I think the stations have come to live and perhaps to even profit from this nonetheless passive arrangement.

Mr. **Coble**. Thank you, Mr. Chairman, I would like to know that if we can get it.

Mr. **Kastenmeier**. The gentleman from California, Mr. Berman?

Mr. **Berman**. Thank you, Mr. Chairman.

I am still confused by your "short-term solutions." I guess you folks don't like the idea that cable systems can import distant signals from your member superstations into an area where one of your local stations has got exclusive programming rights, which that imported signal may include the exact program; is that correct?

Mr. **Padden**. That is correct, but I would have to add that as part of the compromise agreement we entered into with the cable folks on the issue of "must carry" one of the undertakings that our association agreed to, was that we would not come before the Congress and seek a total repeal of cable compulsory copyright license. It is certainly nothing we are very fond of.

Mr. **Berman**. How do you make a philosophical distinction, I mean, "must carry" is also a form of Government intervention into that marketplace as well, isn't it?

Mr. **Padden**. Well, I think we could spend all morning having that——

Mr. **Berman**. OK.

But how do you make a philosophical distinction between a compulsory license, that is being suggested in this proposal that is before us, and then your position, whether it is coerced or not, why should they be treated so differently?

Mr. **Padden**. Well, we are not fans of compulsory licensing. We would look forward to the day when all media competitors could purchase their program weapons and compete on the battlefield of consumer preference on an equal basis. We looked at this bill and thought, "Dear God, here we go again creating another compulsory license."

So we tried to look at the introductory statements to see what was the perceived need to do this, and what we saw is this concern about impending scrambling of the superstations. We concluded that the best answer was to remove what was the cause, the need for this legislation by just not scrambling the superstations, and then there would be no need for Congress to go through the enactment of yet another compulsory license. And that is the best explanation I can give you.

Mr. **Berman**. And the differentiation between not scrambling superstations and not scrambling HBO programming is——

Mr. **Padden**. Is that the owners of HBO purchased the programs, purchased rights in the programs which they sent out and therefore it makes certain sense to us——

Mr. **Berman**. And the superstations——

Mr. **Padden**. And the superstation carrier grabbed the programs out of the air, bought a transponder and a page in cable vision to advertise the availability of the programs and he has acquired no rights whatsoever in those programs, therefore, it doesn't seem to us that anybody needs to worry about somebody stealing the signal from him since he took it in the first place.

Mr. **Berman**. I didn't understand your story of your earlier life with the Dodger games.

Mr. **Padden**. I was counsel to Channel 11 in Los Angeles.

Mr. **Berman**. Channel 11, they would broadcast away Dodger games?

Mr. **Padden**. Right; they had——

Mr. **Berman**. It is not a superstation?

Mr. **Padden**. That is right; they had a copyright license to make local broadcast of the Dodger games. A company that we had never heard of, and who had never contacted channel 11, got a transponder, and took out ads in the Cable Trade Press, that says:

> Here comes another superstation; and you really ought to add this one because it has got the Dodger games; the Dodger games are great; and your subscribers are going to want to pay you a lot of money to see the Dodgers.

The Dodgers called the station. In other words, ASN was trying to make—it was the business of this carrier, ASN, to make channel 11 a superstation.

Mr. **Berman**. I see.

Thank you.

Mr. **Kastenmeier**. Would the gentleman yield on that point?

You are asking what the difference is in the passive common carrier, where a common carrier doesn't own the signals here; doesn't the common carrier who doesn't own the signals charge cable operators for marketing those signals to the cable operator?

So we are not really conceiving of something novel here, that these common carriers don't, in fact, charge for delivery of signals off the satellite.

Mr. **Padden**. I think the best way to put it is we see this bill as an extension of something that has been a matter of great concern to us and to the extent that we are constrained at the moment from seeking to end all compulsory licensing, we are not constrained from seeking to limit the spread of the disease, if you would.

Mr. **Berman**. I think that is more accurate—well, in this case. Those superstations when they are negotiating with the copyright owners of the programming they are using, and their advertising, are their fees enhanced by virtue of that "theft up in the sky" that is going on?

Mr. **Padden**. You would have to direct that question to them; I am not party to their negotiations. But again, I would point out that any of these carriers could go out—let's say you had a station in your home district.

You are out there buying programs for your home district. One of these carriers could come along tomorrow and put you on the satellite and turn you into a superstation without prior consent, knowledge, or any involvement on your part at all.

Again, I go back, the problem, the reason—if I understand the drift of your question—it is that the further distribution of these signals ought to be reflected in the price that is paid and that somehow it will all work itself out in the wash, as it goes back through the system.

But the problem with that is that this superstation carrier activity is being conducted wholly outside of the copyright system so you can't get a handle on it by entering into a license agreement, because under this bill the laws wouldn't respect this license agreement.

Mr. **Berman**. Thank you, Mr. Chairman.

Mr. **Kastenmeier**. Thank you very much for your testimony, Mr. Padden, on behalf of your organization; we appreciate it.

You, in fact, were the last witness this morning.

We will accept for the record, without objection, a written statement of Richard L. Brown, who is not here, but who asked that his written statement be made a part of the record, on behalf of the Satellite Television Viewing Rights Coalition, Inc. Mr. Brown testified on the first day of hearings.

[The statement of Mr. Brown follows:]

TESTIMONY OF RICHARD L. BROWN
BEFORE
THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
REGARDING H.R. 5126
ON BEHALF OF
THE SATELLITE TELEVISION
VIEWING RIGHTS COALITION, INC.

Of Counsel
Brown & Finn, Chartered
1920 N Street, N.W.
Suite 510
Washington, D.C. 20036

Testimony of Richard L. Brown

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to to present testimony before the Subcommittee on the issue of the delivery of the television signals of superstations to home satellite earth station owners. The Satellite Television Viewing Rights Coalition, Inc., ("Coalition") is a broad based group vitally interested in this matter. It includes various state retailer associations, major manufacturers of satellite earth stations, a national satellite consumer organization (ASTRO) and the national earth station industry organization, the Satellite Television Industry Association, Inc./SPACE.

Legislation on this matter is indeed welcomed and is supported whole-heartedly by the Coalition. The question of access to satellite television signals has been one that has been an issue since the very beginning of home earth station technology in the late 1970s and early 1980s. As members of the Subcommittee well know, there were several attempts in the early 1980s to pass legislation that would have had the effect of eliminating the satellite earth station industry. In 1984, the Congress passed an amendment to the Communications Act, §705(b), which provided for a right of access to unscrambled satellite television signals. That legislation did not consider, however, the issue of access to and fair distribution of scrambled signals. Those questions are before the House and the Senate in a variety of legislative initiatives dealing with both the right of access and the distribution of programming as a communications matter.

The open item, so to speak, within all of those legislative initiatives is the question of copyright payments for the scrambled signals of superstations. Receipt of superstation signals by dish owners obviously falls into a different category than the receipt of other signals, primarily because these superstations are passive originators of the programming outside of their service areas, the receipt of which is controlled by carriers and cable systems.

It is clear to every earth station consumer in the country that the scrambling of WOR-TV by Eastern Microwave, Inc., is effectively denying the programming of WOR-TV to home earth station consumers. While we believe that the right of the carrier to scramble under present law poses significant legal issues, it is also clear that once a signal is scrambled it is not certain whether these signals can be marketed to home earth station users without violation of the Copyright Law.

We believe that H.R. 5126 takes into account many items of interest to all concerned parties in order to achieve an open marketplace involving competition in the delivery of programming to the home. In order for this to be fully accomplished, a few additional objectives should be met through further clarification, in some cases, or by revisions to the Bill, in other cases.

Access and Distribution

First, common carriers should be affirmatively required to provide to dish owners the signal of any superstation it carries. Section 119(a)(1) provides a compulsory license for transmission of signals for dish owners through the "private viewing" clause. However, nothing specifically requires, for example, that Eastern Microwave, Inc. actually make the signal available to dish owners once it scrambles WOR-TV's signal. It might be implied that Section 119(a)(4) creates such a mandate. But Section 119(a)(4) merely prohibits discrimination "against any distributor in a manner which violates the Communications Act of 1934. . . ." The Communications Act provisions on discrimination are found in Section 202 of the Communications Act while the provisions of the Communications Act concerning a "duty to deal" are found in Section 201 of the Communications Act. Section 201 is not referred to or alluded to in Section 119(a)(4) of H.R. 5126. It is respectfully suggested that an affirmative duty to deal — to sell programming to dish users — be included in the Copyright Act in order that there will be no confusion on this issue. It would be an untoward result for a carrier to later argue that it had no duty to deal under Section 201 of the Communications Act because a request for service was not "reasonable" under Section 201 for the very reason that Congress omitted such a duty under the Copyright Act when it considered this issue.

Second, carriers should be specifically required to provide service to cable companies as well as to persons or entities that are not affiliated with cable systems for the further distribution of these signals to home earth station users. Section 119(a)(4) prohibits a carrier from discriminating against any distributor in a manner which violates the Communications Act of 1934. The relevant Communications Act provision mandating a duty to deal is, again, Section 201. The provisions of Section 202, dealing with discrimination, would not appear to require dealing with non-cable distributors. Because the legislation specifically contemplates the existence of non-cable distributors, including an affirmative duty to deal with them would eliminate further disputes about this issue. A requirement of the duty should be set forth within Section 119: requiring the carrier to sell to all distribution entities requesting the service.

Clarification With Respect to Liability of Distributors

Section 111 is amended by the Bill by adding clause (4) that states that the provisions of Section 119 "extend only to the activities of a satellite carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions."

Because cable and non-cable distributors may be engaged in the process of the distribution of programming pursuant to the terms of Section 119, it should be made clear that such distributors are not making unlawful secondary transmissions by virtue of their activities in serving satellite dish owners.

Fair Prices to Consumers

Presumably under H.R. 5126, a carrier can sell directly to consumers. Because the 12-cents-per-month charge for copyright payment reflects an estimated parity with the charge the cable operator pays for copyright, on a per-subscriber-basis, then this copyright charge should be passed through (without mark-up) by the carrier to cable and to non-cable distributors. It is assumed that the provisions of Section 119(a)(4) concerning discrimination apply to distribution fees and not to copyright payments. Discrimination in distribution fees might be extremely difficult to determine if the copyright fee were not directly passed through and accounted for in carrier billing to distributors. In that regard, a separate breakout for copyright fees should be required of all carriers to all customers. To permit the combining of copyright and distribution fees would, in essence, allow carriers, not the Congress, to establish Copyright fees.

Copyright Royalty Determinations

The provisions of Section 119(c)(3)(d) establish standards to be considered by the Arbitration Panel. Clause (iii) calls for a determination of the relative roles of the copyright owner and the copyright user "in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk and contribution to the opening of the new markets for creative expression and media for their communication." It should be made clear that the copyright user in this case would be deemed to include the satellite television industry, including manufacturers, distributors and retailers, all of which make significant contributions to the process of making copyrighted materials available to the public.

Clause (ii) refers to "a fair income" to the copyright user. It would appear that the copyright user would be the common carrier or the distributor to the public. Carriers will be compensated from the distribution charge that is made to their customers, not from the copyright fee, which is to award the creator of the copyrighted material. Therefore, in calculating the cable copyright fee, consideration of the user's (carrier or distributor) income does not seem equitable or necessary. The user - carrier or distributor - will derive fair income based upon the economic forces in the marketplace. This has nothing to do with the copyright fee.

We would be pleased to supply the Subcommittee's staff with the appropriate amendments to accomplish the objectives set forth above. We are pleased that this legislation has been introduced and commend the authors and the staff on the expeditious action taken on this important issue for earth station consumers.

In conclusion the chair will state that we would hope to go to markup on this bill at some point, not obviously before before the Labor Day recess. The chair takes note of the fact that the parties, that is to say even Mr. Brown, who is not here, Mr. Valenti, Mr. Taylor, all have reservations about the text of the bill even though they are in general support of it.

In some cases, it may be possible to respond to suggested changes and to the objections raised. In other cases it may not even though those objections are seen plausibly held.

I say that because there are, I suppose, certain sine qua nons between the parties, which if we are to get a bill which has general support, we must respect.

I have to conceive that broadcasters have no positive interest in this bill.

Cable operators again are passive with respect to this bill, are supportive, but really are not beneficiaries of the bill.

Conceding those two points, it may not possible to accommodate all the wishes of the other parties but we will attempt to certainly respond to all of their issues raised here this morning.

I want to thank our witnesses. All of them, I think, very briefly, and succinctly, but very directly, communicated their own view about this legislation, it was very helpful to the committee.

Thank you.

This concludes the hearing today.

[Whereupon, at 12:05 p.m., the hearing adjourned.]

APPENDIXES

APPENDIX I

TEXT OF BILLS

I

99TH CONGRESS
1ST SESSION

H. R. 3108

To amend title 17, United States Code, to clarify the definition of the local service area of a primary transmitter in the case of a low power television station.

IN THE HOUSE OF REPRESENTATIVES

JULY 30, 1985

Mr. KASTENMEIER (for himself and Mr. BOUCHER) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to clarify the definition of the local service area of a primary transmitter in the case of a low power television station.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fourth paragraph of section 111(f) of title 17, United States Code, relating to the definition of local service area of a primary transmitter, is amended by adding after the first sentence the following new sentence: "In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the local service area of a primary transmitter comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 20 miles.".

○

IB

Union Calendar No. 360

99th CONGRESS
2d Session

H. R. 3108

[Report No. 99–615]

To amend title 17, United States Code, to clarify the definition of the local service area of a primary transmitter in the case of a low power television station.

IN THE HOUSE OF REPRESENTATIVES

July 30, 1985

Mr. Kastenmeier (for himself and Mr. Boucher) introduced the following bill; which was referred to the Committee on the Judiciary

June 3, 1986

Additional sponsors: Mr. Marlenee, Mr. Hubbard, Mr. Leach of Iowa, Mr. MacKay, Mr. Grotberg, Mr. Mazzoli, Mr. Morrison of Connecticut, Mr. Moorhead, Mr. Berman, Mr. Hyde, Mr. DeWine, and Mr. Coble

June 3, 1986

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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A BILL

To amend title 17, United States Code, to clarify the definition of the local service area of a primary transmitter in the case of a low power television station.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fourth paragraph of section 111(f) of title 17, United

States Code, relating to the definition of local service area of a primary transmitter, is amended by adding after the first sentence the following new sentence: "In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the 'local service area of a primary transmitter' comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 20 miles.".

99TH CONGRESS
2D SESSION

H. R. 5126

To amend title 17, United States Code, relating to copyrights, to provide for the temporary compulsory licensing of the secondary transmission by satellite carriers of superstations for private viewing by earth station owners.

IN THE HOUSE OF REPRESENTATIVES

JUNE 26, 1986

Mr. KASTENMEIER (for himself, Mr. SYNAR, Mr. WIRTH, Mr. BOUCHER, and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, relating to copyrights, to provide for the temporary compulsory licensing of the secondary transmission by satellite carriers of superstations for private viewing by earth station owners.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Satellite Home Viewer Act of 1986".

SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.

Title 17, United States Code, is amended as follows:

(1) Section 111 is amended—

(A) in subsection (a)—

(i) in clause (3) by striking "or" at the end;

(ii) by redesignating clause (4) as clause (5); and

(iii) by inserting the following after clause (3):

"(4) the secondary transmission is made for private viewing pursuant to a compulsory license under section 119; except that the provisions of this clause extend only to the activities of a satellite carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or"; and

(B) in subsection (d)(2)(A) by inserting before "Such statement" the following:

"In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private viewing pursuant to section 119."

(2) Chapter 1 of title 17, United States Code, is amended by adding at the end the following new section:

"§ 119. Limitations on exclusive rights: Secondary transmissions of superstations for private viewing

"(a) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—

"(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions of a primary transmission made by a superstation and embodying a performance or display of a work shall be subject to compulsory licensing if the secondary transmission is made by a satellite carrier to the public for private viewing, and the carrier makes a direct charge for such retransmission service from each subscriber receiving the secondary transmission or from a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private viewing.

"(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where the satellite carrier has not recorded the notice specified by and deposited the statement of account and royalty fee required by subsection (b).

"(3) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions.

"(4) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier discriminates against any distributor in a manner which violates the Communications Act of 1934 or rules issued by the Federal Communications Commission with respect to discrimination.

"(b) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE VIEWING.—

"(1) A satellite carrier whose secondary transmissions are subject to compulsory licensing under subsection (a) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation—

"(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all superstations whose signals were transmitted to subscribers for private viewing as described in subsection (a)(1), the total number of subscribers that received such transmissions, and such other data as the Register of Copyrights may from time to time prescribe by regulation; and

"(B) a royalty fee for that 6-month period, computed by multiplying the number of subscribers receiving the secondary transmission each calendar month by 12 cents.

"(2) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under clause (4)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Register of Copyrights as provided by this title.

"(3) The royalty fees deposited under clause (2) shall, in accordance with the procedures provided by clause (4), be distributed to those copyright owners whose work was included in a secondary transmission for private viewing made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the Register of Copyrights under clause (4).

"(4) The royalty fees deposited under clause (2) shall be distributed in accordance with the following procedures:

"(A) During the month of July in each year, each person claiming to be entitled to compulsory license fees for secondary transmissions for private viewing shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Notwithstanding any provision of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Register determines that no such controversy exists, the Register shall, after deducting reasonable administrative costs under this clause, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Register finds the existence of a controversy, the Register shall, pursuant to chapter 7 of this title, conduct a proceeding to determine the distribution of royalty fees. In determining the distribution of royalty fees, the Register shall take into account the royalty distribution determinations of the Copyright Royalty Tribunal pursuant to section 111.

"(C) During the pendency of any proceeding under this subsection, the Register of Copyrights shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(c) DETERMINATION OF ROYALTY FEES.—

"(1) METHODS FOR DETERMINING ROYALTY FEES.—The rate of the royalty fee payable under subsection (b)(1)(B) shall be effective until December 31, 1990, absent a royalty fee established under clause (2) or (3) of this subsection. After that date, the fee shall be determined either in accordance with the voluntary negotiation procedure specified in clause (2) of this subsection or in accordance with the compulsory arbitration procedure specified in clauses (3) and (4) of this subsection.

"(2) FEE SET BY VOLUNTARY NEGOTIATION.—

"(A) On or before July 1, 1989, the Register shall cause notice to be published in the Federal

Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by satellite carriers under subsection (b)(1)(B) of this section.

"(B) Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees. Notwithstanding any provision of the antitrust laws, any such satellite carriers, distributors, and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees. If the parties fail to identify common agents, the Register of Copyrights shall do so, after requesting recommendations from the parties to the negotiation proceeding. The parties to each negotiation proceeding shall bear the entire cost thereof.

"(C) Voluntary agreements negotiated at any time in accordance with this clause shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto. Copies of such agreements shall be filed in the Copyright Office within thirty days after execution in accordance with regulations that the Register shall prescribe.

"(D) The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Office in accordance with this clause shall become effective on the date specified in the agreement, and shall remain in effect until December 31, 1994.

"(3) FEE SET BY COMPULSORY ARBITRATION.—

"(A) On or before December 31, 1989, the Register shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) of this section by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection. Such notice shall include the names and qualifications of potential arbitrators chosen by the Register from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Register shall select.

"(B) Not later than ten days after publication of the notice initiating an arbitration proceeding, and in accordance with procedures to be specified by the Register, one arbitrator shall be selected from the published list by copyright owners who claim to be entitled to royalty fees under subsection (b)(4) of this section and who are not party to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, and one arbitrator shall be selected from the published list by satellite carriers and distributors who are not parties to such a voluntary agreement. The two arbitrators so selected shall, within ten days after their selection, choose a third arbitrator from the same list, who shall serve as chairperson of the arbitrators. If either group fails to agree upon the selection of an arbitrator, or if the arbitrators selected by such groups fails to agree upon the selection of a chairperson, the Register shall promptly select the arbitrator or chairperson, respectively. The arbitrators selected under this paragraph shall constitute an Arbitration Panel.

"(C) The Arbitration Panel shall conduct an arbitration proceeding in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record.

Any copyright owner who claims to be entitled to royalty fees under subsection (b)(4) of this section, any satellite carrier, and any distributor, who is not party to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, may submit relevant information and proposals to the Panel. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

"(D) In determining royalty fees under this clause, the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copyright Office in accordance with clause (3) of this subsection, and the last fee proposed by the parties, before proceedings under this clause, for the secondary transmission of superstations for private viewing. The fee shall also be calculated to achieve the following objectives:

"(i) To maximize the availability of creative works to the public.

"(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

"(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

"(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

"(E) Not later than sixty days after publication of the notice initiating an arbitration proceeding, the Arbitration Panel shall report to the Register its determination concerning the royalty fee. Such report shall be accompanied by the written record, and shall set forth the facts that the Board found relevant to its determination and the reasons why its determination is consistent with the criteria set forth in paragraph (D) of this clause.

"(F) Within 60 days after receiving the report of the Arbitration Panel under paragraph (E) of this clause, the Register shall adopt or reject the determination of the Panel. The Register shall adopt the determination of the Panel unless the Register finds that the determination is clearly inconsistent with the criteria set forth in paragraph (D) of this clause. If the Register rejects the determination of the Panel, the Register shall, before the end of that 60-day period, issue an order, consistent with the criteria set forth in paragraph (D) of this clause, setting the royalty fee under this clause. The Register shall cause to be published in the Federal Register the determination of the Panel, and the Register's decision with respect to the determination (including any order issued under the preceding sentence). The Register shall also publicize such determination and decision in such other manner as the Register considers appropriate. The Register shall also make the report of the Arbitration Panel and the accompanying record available for public inspection and copying.

"(G) The obligation to pay the royalty fee established under a determination of the Arbitration Panel which is confirmed by the Register in accordance with this clause, or established by any order issued under paragraph (F) of this clause, shall become effective on the date when the Register's decision is published in the Federal Register under paragraph (F) of this clause, and shall remain in effect until modified in accordance with clause (4) of this subsection, or until December 31, 1994.

"(H) The royalty fee adopted or ordered under paragraph (F) of this clause shall be binding on all satellite carriers, distributors, and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under clause (2) of this subsection.

"(4) Judicial review.—Any decision of the Register under clause (3) of this subsection with respect to a determination of an arbitration panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the publication of the decision in the Federal Register. The pendency of an appeal under this clause shall not relieve satellite carriers of the obligation under subsection (b)(1) of this section to record the notice, and deposit the statement of account and royalty fees, specified in that subsection. The court shall have jurisdiction to modify or vacate a decision of the Register only if it finds, on the basis of the record before the Register and the statutory criteria set forth in clause (3)(D) of this subsection, that the Arbitration Panel or the Register acted in an arbitrary manner. If the court modifies the Register's decision, the court shall have jurisdiction to enter its own determination with respect to royalty fees, to order the repayment of any excess fees deposited under subsection (b)(1)(B) of this section, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the Register's decision and remand the case for arbitration proceedings in accordance with clause (3) of this subsection.

"(d) DEFINITIONS.—As used in this section—

(1) ANTITRUST LAWS.—The term 'antitrust laws' has the meaning given that term in subsection (a) of the first section of the Clayton Act (15 U.S.C 12(a)).

"(2) DISTRIBUTOR.—The term 'distributor' means an entity which contracts for satellite secondary transmissions from a carrier and, either as a single channel or in a package with other programming, provides the satellite secondary transmission either directly to the individual subscribers for private viewing or indirectly through other program distribution entities.

"(3) PRIMARY TRANSMISSION.—The term 'primary transmission' has the meaning given that term in section 111(f) of this title.

"(4) PRIVATE VIEWING.—The term 'private viewing' means the viewing, for private use in an individual's dwelling unit by means of equipment which is operated by or for such individual, of a secondary transmission delivered by satellite of a primary transmission of a television broadcast station licensed by the Federal Communications Commission.

"(5) SATELLITE CARRIER.—The term 'satellite carrier' means a common carrier that owns or leases a transponder on a satellite in order to provide the point-to-multipoint relay of television station signals to numerous receive-only earth stations.

"(6) SECONDARY TRANSMISSION.—The term 'secondary transmission' has the meaning given that term in section 111(f) of this title.

"(7) SUBSCRIBER.—The term 'subscriber' means an individual who receives a secondary transmission service for private viewing by means of a satellite transmission in accordance with this section and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor. In the case of a building with more than one dwelling unit, each dwelling unit which receives secondary transmission service for private viewing by means of a satellite transmission shall be considered to be a subscriber, whether or not a separate fee for such service is required for each unit by a satellite carrier or distributor.

"(8) SUPERSTATION.—The term 'superstation' means a television broadcast station licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier for nationwide distribution.".

(3) Chapter 7 of title 17, United States Code, is amended by adding at the end the following new section:

"§ 711. Institution and conclusion of royalty distribution proceedings

"(a) With respect to proceedings under section 119(b)(4) concerning the distribution of royalty fees, the Register of Copyrights shall, upon determination that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter. Following publication of such notice, the

Register shall initiate proceedings without delay to determine the distribution of any amount of royalty fees in controversy. The Register shall render a final decision in any such proceeding within one year from the date of publication of such notice.

"(b) The Register of Copyrights shall adopt regulations governing the procedure to be followed in such proceedings. Except as otherwise provided in this chapter, such regulations shall be subject to the provisions of subchapter II of chapter 5 and chapter 7 of title 5.

"(c) Every final determination of the Register of Copyrights under this section shall be published in the Federal Register. It shall state in detail the criteria that the Register determined to be applicable to the particular proceeding, the facts found to be relevant to the determination in that proceeding, and the specific reasons for the determination.".

(4) The table of sections for chapter 1 of title 17, United States Code, is amended by adding at the end the following new item:

"119. Limitations on exclusive rights: Secondary transmissions of superstations for private viewing.".

(5) The table of sections for chapter 7 of title 17, United States Code, is amended by adding at the end the following new item:

"711. Institution and conclusion of royalty distribution proceedings.".

SEC. 3. EFFECTIVE DATE.

This Act and the amendments made by this Act take effect on January 1, 1987, except that the authority of the Register of Copyrights to set rates pursuant to the amendments made by this Act takes effect upon the date of the enactment of this Act.

SEC. 4. TERMINATION.

This Act and the amendments made by this Act cease to be effective on December 31, 1994.

○

99TH CONGRESS
2D SESSION

H. R. 5572

To amend title 17, United States Code, relating to copyrights, to provide for the temporary compulsory licensing of the secondary transmission by satellite carriers of superstations for private viewing by earth station owners.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 1986

Mr. KASTENMEIER (for himself, Mr. SYNAR, Mr. WIRTH, Mr. BOUCHER, and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, relating to copyrights, to provide for the temporary compulsory licensing of the secondary transmission by satellite carriers of superstations for private viewing by earth station owners.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Satellite Home Viewer Act of 1986".

SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.

Title 17, United States Code, is amended as follows:

(1) Section 111 is amended—

(A) in subsection (a)—

(i) in clause (3) by striking "or" at the end;

(ii) by redesignating clause (4) as clause (5); and

(iii) by inserting the following after clause (3):

"(4) the secondary transmission is made by a satellite carrier for private viewing pursuant to a compulsory license under section 119; or"; and

(B) in subsection (d)(2)(A) by inserting before "Such statement" the following:

"In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private viewing pursuant to section 119."

(2) Chapter 1 of title 17, United States Code, is amended by adding at the end the following new section:

"§ 119. Limitations on exclusive rights: Secondary transmissions of superstations for private viewing

"(a) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS.—

"(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions of a primary transmission made by a superstation and embodying a performance or display of a work shall be subject to compulsory licensing if the secondary transmission is made by a satellite carrier to the public for private viewing, and the carrier makes a direct charge for such retransmission service to each subscriber receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private viewing.

"(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where the satellite carrier has not deposited the statement of account and royalty fee required by subsection (b).

"(3) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal.

"(4) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier discriminates against a distributor in a manner which violates the Communications Act of 1934 or rules issued by the Federal Communications Commission with respect to discrimination.

"(b) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE VIEWING.—

"(1) A satellite carrier whose secondary transmissions are subject to compulsory licensing under subsection (a) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal, prescribe by regulation—

"(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all superstations whose signals were transmitted, at any time during that period, to subscribers for private viewing as described in subsection (a)(1), the total number of subscribers that received such transmissions, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal, from time to time prescribe by regulation; and

"(B) a royalty fee for that 6-month period, computed by multiplying the number of subscribers receiving each secondary transmission during each calendar month by 12 cents.

"(2) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under clause (4)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title.

"(3) The royalty fees deposited under clause (2) shall, in accordance with the procedures provided by clause (4), be distributed to those copyright owners whose works were included in a secondary transmission for private viewing made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the Copyright Royalty Tribunal under clause (4).

"(4) The royalty fees deposited under clause (2) shall be distributed in accordance with the following procedures:

"(A) During the month of July in each year, each person claiming to be entitled to compulsory license fees for secondary transmissions for private viewing shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provision of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, the Tribunal shall, after deducting reasonable administrative costs under this clause, distribute such fees to the copyright owners entitled to receive them, or to their designated agents. If the Tribunal finds the existence of a controversy, the Tribunal shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

"(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(c) DETERMINATION OF ROYALTY FEES.—

"(1) METHODS FOR DETERMINING ROYALTY FEES.—The rate of the royalty fee payable under subsection (b)(1)(B) shall be effective until December 31, 1990, unless a royalty fee is established under clause (2) or (3) of this subsection. After that date, the fee shall be determined either in accordance with the voluntary negotiation procedure specified in clause (2) of this subsection or in accordance with the compulsory arbitration procedure specified in clauses (3) and (4) of this subsection.

"(2) FEE SET BY VOLUNTARY NEGOTIATION.—

"(A) On or before July 1, 1989, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by satellite carriers under subsection (b)(1)(B) of this section.

"(B) Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees. Notwithstanding any provision of the antitrust laws, any such satellite carriers, distributors, and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees. If the parties fail to identify common agents, the Copyright Royalty Tribunal shall do so, after requesting recommendations from the parties to the negotiation proceeding. The parties to each negotiation proceeding shall bear the entire cost thereof.

"(C) Voluntary agreements negotiated at any time in accordance with this clause shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto. Copies of such agreements shall be filed with the Copyright Office within thirty days after execution in accordance with regulations that the Register of Copyrights shall prescribe.

"(D) The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Office in accordance with this clause shall become effective on the date specified in the agreement, and shall remain in effect until December 31, 1994.

"(3) FEE SET BY COMPULSORY ARBITRATION.—

"(A) On or before December 31, 1989, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) of this section by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection. Such notice shall include the names and qualifications of potential arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select.

"(B) Not later than ten days after publication of the notice initiating an arbitration proceeding, and in accordance with procedures to be specified by the Copyright Royalty Tribunal, one arbitrator shall be selected from the published list by copyright owners who claim to be entitled to royalty fees under subsection (b)(4) of this section and who are not party to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, and one arbitrator shall be selected from the published list by satellite carriers and distributors who are not parties to such a voluntary agreement. The two arbitrators so selected shall, within ten days after their selection, choose a third arbitrator from the same list, who shall serve as chairperson of the arbitrators. If either group fails to agree upon the selection of an arbitrator, or if the arbitrators selected by such groups fails to agree upon the selection of a chairperson, the Copyright Royalty Tribunal shall promptly select the arbitrator or chairperson, respectively. The arbitrators selected under this paragraph shall constitute an Arbitration Panel.

"(C) The Arbitration Panel shall conduct an arbitration proceeding in accordance with such procedures as it may adopt. The Panel shall act on the basis of a fully documented written record.

Any copyright owner who claims to be entitled to royalty fees under subsection (b)(4) of this section, any satellite carrier, and any distributor, who is not party to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, may submit relevant information and proposals to the Panel. The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct.

"(D) In determining royalty fees under this clause, the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, and the last fee proposed by the parties, before proceedings under this clause, for the secondary transmission of superstations for private viewing. The fee shall also be calculated to achieve the following objectives:

"(i) To maximize the availability of creative works to the public.

"(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

"(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

"(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

"(E) Not later than sixty days after publication of the notice initiating an arbitration proceeding, the Arbitration Panel shall report to the Copyright Royalty Tribunal its determination concerning the royalty fee. Such report shall be accompanied by the written record, and shall set forth the facts that the Board found relevant to its determination and the reasons why its determination is consistent with the criteria set forth in paragraph (D) of this clause.

"(F) Within 60 days after receiving the report of the Arbitration Panel under paragraph (E) of this clause, the Copyright Royalty Tribunal shall adopt or reject the determination of the Panel. The Tribunal shall adopt the determination of the Panel unless the Tribunal finds that the determination is clearly inconsistent with the criteria set forth in paragraph (D) of this clause. If the Tribunal rejects the determination of the Panel, the Tribunal shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order, consistent with the criteria set forth in paragraph (D) of this clause, setting the royalty fee under this clause. The Tribunal shall cause to be published in the Federal Register the determination of the Panel, and the decision of the Tribunal with respect to the determination (including any order issued under the preceding sentence). The Tribunal shall also publicize such determination and decision in such other manner as the Tribunal considers appropriate. The Tribunal shall also make the report of the Arbitration Panel and the accompanying record available for public inspection and copying.

"(G) The obligation to pay the royalty fee established under a determination of the Arbitration Panel which is confirmed by the Copyright Royalty Tribunal in accordance with this clause, or established by any order issued under paragraph (F) of this clause, shall become effective on the date when the decision of the Tribunal is published in the Federal Register under paragraph (F) of this clause, and shall remain in effect until modified in accordance with clause (4) of this subsection, or until December 31, 1994.

"(H) The royalty fee adopted or ordered under paragraph (F) of this clause shall be binding on all satellite carriers, distributors, and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under clause (2) of this subsection.

"(4) JUDICIAL REVIEW.—Any decision of the Copyright Royalty Tribunal under clause (3) of this subsection with respect to a determination of the Arbitration Panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the publication of the decision in the Federal Register. The pendency of an appeal under this clause shall not relieve satellite carriers of the obligation under subsection (b)(1) of this section to deposit the statement of account and royalty fees specified in that subsection. The court shall have jurisdiction to modify or vacate a decision of the Tribunal only if it finds, on the basis of the record before the Tribunal and the statutory criteria set forth in clause (3)(D) of this subsection, that the Arbitration Panel or the Tribunal acted in an arbitrary manner. If the court modifies the decision of the Tribunal, the court shall have jurisdiction to enter its own determination with respect to royalty fees, to order the repayment of any excess fees deposited under subsection (b)(1)(B) of this section, and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment. The court may further vacate the decision of the Tribunal and remand the case for arbitration proceedings in accordance with clause (3) of this subsection.

"(d) DEFINITIONS.—As used in this section—

"(1) ANTITRUST LAWS.—The term 'antitrust laws' has the meaning given that term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

"(2) **Distributor.**—The term 'distributor' means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private viewing or indirectly through other program distribution entities.

"(3) **Independent station.**—The term 'independent station' has the meaning given that term in section 111(f) of this title.

"(4) **Primary transmission.**—The term 'primary transmission' has the meaning given that term in section 111(f) of this title.

"(5) **Private viewing.**—The term 'private viewing' means the viewing, for private use in an individual's dwelling unit by means of equipment which is operated by such individual, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission.

"(6) **Satellite carrier.**—The term 'satellite carrier' means a common carrier that is licensed by the Federal Communications Commission to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a transponder on a satellite in order to provide such point-to-multipoint distribution.

"(7) SECONDARY TRANSMISSION.—The term 'secondary transmission' has the meaning given that term in section 111(f) of this title.

"(8) SUBSCRIBER.—The term 'subscriber' means an individual who receives a secondary transmission service for private viewing by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor.

"(9) SUPERSTATION.—The term 'superstation' means an independent station licensed by the Federal Communications Commission that—

"(A) was secondarily transmitted by a satellite carrier for nationwide distribution on June 1, 1986, or

"(B) is secondarily transmitted by a satellite carrier and is then secondarily transmitted by cable systems serving, in the aggregate, not less than 10 percent of all cable television subscribers, as reflected in the most current statements of account deposited by cable systems with the Register of Copyrights in accordance with section 111(d)(2)(A) of this title.".

(3) Section 801(b)(3) of title 17, United States Code, is amended by striking "and 116" and inserting ", 116, and 119(b)".

(4) Section 804(d) of title 17, United States Code, is amended by striking "sections 111 or 116" and inserting "section 111, 116, or 119".

(5) The table of sections for chapter 1 of title 17, United States Code, is amended by adding at the end the following new item:

"119. Limitations on exclusive rights: Secondary transmissions of superstations for private viewing.".

SEC. 3. EFFECTIVE DATE.

This Act and the amendments made by this Act take effect on January 1, 1987, except that the authority of the Copyright Royalty Tribunal to set rates pursuant to the amendments made by this Act takes effect upon the date of the enactment of this Act.

SEC. 4. TERMINATION.

This Act and the amendments made by this Act cease to be effective on December 31, 1994.

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APPENDIX II

MATERIALS RELATING TO LOW POWER TELEVISION/COPYRIGHT

99TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
99-615

AMENDING TITLE 17, UNITED STATES CODE, TO CLARIFY THE DEFINITION OF THE LOCAL SERVICE AREA OF A PRIMARY TRANSMITTER IN THE CASE OF A LOW POWER TELEVISION STATION

JUNE 3, 1986.—Committed to the Committee on the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3108]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3108) to amend title 17, United States Code, to clarify the definition of the local service area of a primary transmitter in the case of a low power television station, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE LEGISLATION

The purpose of the legislation is to clarify any ambiguity that might exist in current copyright law regarding the classification of cable systems' retransmission of low power television (LPTV) signals for purposes of calculating copyright royalty payments and obligations under Section 111(c) of the Copyright Act. This clarification makes clear that a cable system's retransmission of such a signal within the defined local service area of the low power television station constitutes retransmission of a "local signal", for which no royalty payment is required. In so doing, the proposed legislation conforms with the current policy of the Copyright Office of the United States.

BACKGROUND

The Copyright Act of 1976—in 17 U.S.C. 111(c)—establishes a compulsory licensing mechanism under which cable systems may make secondary transmissions of copyrighted works. This compulsory license is subject to various conditions, including the requirements that cable systems file Statements of Account semi-annually and pay copyright statutory royalty fees in accordance with section 111(d)(2) and as adjusted by the Copyright Royalty Tribunal pursuant to section 801(b)(2).

Six years after the enactment of section 111, the Federal Communications Commission (FCC) authorized the establishment of low power television stations entitled to originate programming.[1] In describing this new service, the Commission noted the rapid development "of new and competitive technologies designed to deliver entertainment and information services to the public" and recognized that low power television would "permit fuller utilization of the broadcast spectrum in service to those ends." [2] Since 1982, several hundred low power television stations have gone on the air and a greater number of construction permits have been granted. Lotteries for new construction permits are held every month. The FCC is expected to grant up to 4,000 of these permits.[3]

The basic function of low power television is to provide local television service in markets (typically in rural communities) that are presently underserved by conventional full-power television. "Ultimately such low power television could serve communities much as local radio stations serve such communities today." [4]

As has all too often been the case, rapid and unforeseen technological developments occurring subsequent to passage of the 1976 Copyright Act have rendered its literal terms ambiguous. As aptly observed in a recent report issued by the Office of Technology Assessment at the request of this Committee: "Once a relatively slow and ponderous process, technological change is now outpacing the legal structure that governs the system, and is creating pressures on Congress to adjust the law to accommodate these changes." [5]

Specifically, the status of low power television stations—not in existence at the time of the 1976 Copyright Act—under the Act's definition of the "local service area of a primary transmitter" has been questioned. This definition establishes the demarcation between so-called "local" and "distant" signals under the cable compulsory license. This demarcation is critically important since large cable systems, whose semiannual gross receipts exceed $214,000, compute their copyright royalties beyond the minimum fee on the basis of distant signal carriage (i.e., the "distant signal equivalent" formula is applied).

By contrast, cable systems pay no fee for local retransmission of "local signals." The basis for this significantly different treatment is found in this Committee's report accompanying the 1976 Act:

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[1] See 47 Fed. Reg. 21468 (1982) on recon. 48 Fed. Reg. 21478 (1983). See also Hearings on Copyright Issues Arising from New Communications Technologies before the House Judiciary Subcomm. on Courts, Civil LIberties and the Administration of Justice, 99th Cong., 1st Sess. (1985) [hereinafter referred to as House Hearings] (statement of Ralph Oman, Register of Copyrights). Prior to this time, some low power television stations had acted as so-called "translater" stations; however, they did not originate programming.

[2] 47 Fed. Reg. at 21468.

[3] House Hearings, supra note 1 (statement of Ralph Oman).

[4] 131 Cong. Rec. E3626 (daily ed. July 31, 1985) (remarks of Robert W. Kastenmeier). The FCC has aptly observed that "low power service can provide additions to both 'basic' service and diversity of service, in furtherance of local service objectives . . ." "Report and Recommendations in the Low Power Inquiry," BC Docket No. 78-53 at 89, September 9, 1980.

[5] See generally, Intellectual Property Rights in an Age of Electronics and Information at 3 (Office of Technology Assessment 1986).

> In setting an initial fee schedule, the Senate bill based the royalty fee on a sliding scale related to the gross receipts of a cable system for providing the basic retransmission service, and rejected a statutory scheme that would distinguish between "local" and "distant" signals. The Committee determined, however, that there was no evidence that the retransmission of "local" braodcast signals by a cable operator threatens the existing market for copyright program owners.[6]

The Committee's view prevailed in conference and was enacted in 17 U.S.C. 111(c).

The failure to treat a cable operator's local retransmission of a "local" low power television station's signal in the same manner as retransmission of a full power station's signal is both illogical and contrary to Congress' intent as manifested in section 111(c) of the 1976 Copyright Act.

The meaning of "local service area of a primary transmission" is found in the definitions section of 17 U.S.C. 111(f). That section provides that in the case of a television broadcast station, the "local service area of a primary transmitter" comprises the area in which such station is entitled to insist upon retransmission of its signal by a cable system pursuant to the rules, regulations and reauthorizations of the FCC in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. The existing statutory definition of local service area therefore covers those broadcast services in existence in 1976, full-power domestic TV stations, Canadian and Mexican stations, and radio stations. Because all full-power domestic stations were subject to the 1976 mandatory carriage rules, Congress—as merely a convenient way to establish a clear dividing line between "local" and "distant" signals—defined the area of local service for copyright purposes in terms of the must-carry area specified in the FCC's rules, in effect on April 15, 1976. As noted above, however, low power originating television stations were not in existence on that date and thus could hardly be subject to the FCC's rules.

Importantly, the proposed legislation (H.R. 3108) is neither affected by nor affects the decision of the United States Court of Appeals for the District of Columbia that present must-carry rules are unconstitutional as violative of the First Amendment.[7] In authorizing the establishment of low power television originating stations in 1982, the FCC declined to accord such stations must-carry status.[8] Should the decision of the Court of Appeals be reversed, low power television stations would still not be entitled to mandatory carriage, nor would enactment of H.R. 3108 legislatively accomplish such a result.

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[6] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976).

[7] See *Quincy Cable TV, Inc.*, v. *Federal Communications Commission*, 768 F. 2d 1434 (D.C. Cir. 1985). Indeed, the *Quincy* court expressly noted that the must-carry rules may continue to serve as "a convenient reference point for determining where local signal ends and a distant signal begins" for copyright purposes. Id. at 1454 n. 42.

[8] 47 Fed. Reg. at 21492.

In order to insure that low power stations are treated in the same manner as full-power domestic and Canadian and Mexican signals with respect to when carriage of those signals will be "local" and royalty-free and when they will be "distant", it is accordingly necessary to clarify the current law. Present day confusion—even after the clarification of policy by the Copyright Office—has created a reluctance on the part of some cable systems to carry the programming of LPTV stations without paying prohibitively high royalty payments and to thereby risk copyright liability, however slight that risk might be. Without cable carriage, advertisers and copyright owners are reluctant to provide material for broadcast on low power television, resulting in negative effects on the pool of programming available to such stations. The net result is that audiences, especially in rural areas, are deprived of local programming offered by these stations. Ultimately, the economic viability of this fledgling broadcast service is threatened.[9]

H.R. 3108 therefore modifies section 111(f) of title 17, United States Code, to define specifically the "local service area" of a low power television station in a manner such that cable systems will know with precision when their carriage of such a station is "local" and when it is "distant". For low power stations located outside the 50 metropolitan statistical areas with the largest populations based on the 1980 census, that area would comprise a radius of 35 miles from the low power station's transmitter site. The 35-mile standard is used because it was formerly part of the FCC's definition of specified zone of a television broadcast station.[10] Although low power stations were previously unprotected by this standard because it was applied only to full service broadcast stations, the 35-mile limit nonetheless is a convenient measure for the proposed legislative change contained in H.R. 3108. As a consequence, a cable system located within that area may carry that station's signal as a "local" signal without payment of royalties other than the relevant minimum fee. In heavily populated areas represented by the top 50 metropolitan statistical areas, however, the area of local service would be reduced to 20 miles. This lesser geographic distance is an approximation of the range of a LPTV station within such major markets, characterized by the multiplicity of television signals.

This statutory clarification will remove any remaining copyright ambiguities facing cable systems and enable decisions as to whether or not to carry low power stations on a local basis to be based on what is best for subscribers and the community served.

The result of this statutory change will be increased programming possibilities in underserved small communities, promotion of localism, the freer flow of information and ideas, more satisfied viewers, and a clearer and more consistent copyright law.

The legislation has engendered no known opposition.

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[9] See House Hearings, supra note 1 (statement of Richard Hutcheson).

[10] See 47 C.F.R. 76.5 (f).

LEGISLATIVE HISTORY

It was in the waning days of the 98th Congress that the Committee first learned of lack of clarity in existing copyright law as regards low power television. At that time, several Members of both the House and Senate felt that a clarifying amendment could be added to an unrelated piece of legislation, and perhaps enacted into law before the end of the Congress. This approach, however, would not have allowed the Committee—through the Subcommittee on Courts, Civil Liberties and the Administration of Justice—to examine a particular bill, hold hearings, conduct an open mark-up or otherwise follow the normal procedures of either the House or the Senate.

Expressing reluctance to bypass the Rules of the House of Representatives, in September, 1984, the Chairman of the Subcommittee (Robert W. Kastenmeier) contracted his counterpart chairman in the Senate, Senator Charles McC. Mathias, Jr. Together, on October 1, 1985, they wrote to the then-Register of Copyrights, David Ladd, asking that administrative action be taken to resolve the problem since Congress was scheduled to adjourn within days. In the Kastenmeier-Mathias letter, it was observed that under one potential interpretation of the law, "cable systems would be very reluctant to include low power stations within their complement of local services on a 'may-carry' basis, which in turn would seriously damage the development or viability of low power television."[11] Practically speaking, a low power television signal is not powerful enough to be designated a "distant signal" since its maximum range is only 10 to 20 miles. The Kastenmeier-Mathias letter concluded that in the 99th Congress, any ambiguity in existing law would be clarified by a technical amendment.[12]

On October 12, 1984, the Copyright Office expeditiously responded by holding a public hearing on the matter. After receiving public comment through October 22, 1984, the Office determined that it would henceforth not question the determination of a cable system that a low power television signal carried by that cable system is a local signal and therefore exempt from the royalty fee. By way of a letter dated November 29, 1984, to Chairman Kastenmeier from General Counsel Dorothy Schrader, the Office expressly stated:

> * * * that the status of low power television signals under the cable compulsory license is ambiguous. Accordingly, in examining cable Statements of Account, the Copyright Office will not question the determination by a cable system that a low power station's signal is "local" within an area approximating the normal coverage zone of such station.[13]

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[11] A copy of the Kastenmeier-Mathias letter is attached as Appendix I. The interpretation referred to was based on the following argument: "Since the definition of "local service area of a primary transmitter" was specifically tied to the transmitter's ability to insist on mandatory carriage under the rules of the FCC in effect on April 15, 1976, and low power television stations did not have the right to insist upon such carriage under those rules, low-power television stations did not have a "local service area" and must, therefore, be "distant signals". While not without some theoretical attractiveness, this argument defied reality.

[12] Id.

[13] A copy of the Schrader letter is attached as Appendix II.

The Copyright Office further expressed its support for legislative clarification of the statutory ambiguity by a technical amendment to the Copyright Act.[14]

The legislation embodied in H.R. 3108 accomplishes this objective. H.R. 3108 was introduced on July 30, 1984, after drafting discussions were held with the low power television industry and the Copyright Office as well as representatives of the cable television industry, broadcasters and the motion picture industry.[15] Companion legislation has been introduced in the Senate by Senator Mathias in the form of S. 1526.

On November 20, 1985, a hearing was held by the Subcommittee on Courts, Civil Liberties and the Administration of Justice on Copyright Issues arising from New Communications Technologies. H.R. 3108 was on the table. Testimony was received from Ralph Oman (Register of Copyrights); Richard Hutcheson (Community Broadcasters Association); and Rick Brown (Society for Private and Commercial Earth Stations (SPACE)).

On January 22, 1986, H.R. 3108 was reported favorably by voice vote to the full Committee by the Subcommittee.

On May 6, 1986, H.R. 3108 was considered by the Committee and, a quorum of members being present, ordered favorably reported by voice vote to the full House.

SECTIONAL ANALYSIS

H.R. 3108 is a one section bill. It adds a new sentence to the fourth paragraph of section 111(f) of title 17, United States Code, relating to the definition of local service area.

In principal part, section 111(f) currently provides that:

> The "local service area of primary transmitter," in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations and authorizations of the Federal Communications Commission in effect on April 25, 1976 * * *.

H.R. 3108 adds language clarifying that in the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the "local service area of a primary transmitter" includes the geographic area within 35 miles of the transmitter site, except that in the case of such a station being located in a metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas—based on the 1980 decennial census taken by the Secretary of Commerce—the number of miles shall be 20 miles.

OVERSIGHT FINDINGS

The Committee makes the oversight findings found in this report with respect to this legislation.

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[14] Id.

[15] H.R. 3108 is co-sponsored by Representatives Boucher, Marlenee, Hubbard, Leach, MacKay, Grotberg, Mazzoli, Morrison (of Conn.), Moorhead, Berman, Hyde, DeWine, and Coble.

In regard to clause 2(a)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

NEW BUDGET AUTHORITY

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the bill creates no new budget authority on increased tax expenditures for the Federal government.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee feels that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

FEDERAL ADVISORY COMMITTEE ACT OF 1972

The Committee finds that this legislation does not create any new advisory committees within the meaning of the Federal Advisory Committee Act of 1972.

COST ESTIMATE

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 8, 1986.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives,
Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3108, a bill to amend title 17 of the United States Code, to clarify the definition of the local service area of a primary transmitter in the case of a low power television station, as ordered reported by the House Committee on the Judiciary, May 6, 1986. We estimate that enactment of this bill would result in no additional costs to the federal government or to state or local governments.

H.R. 3108 would specifically add low power television (LPTV) stations to the more general definition of the local service areas of television stations in the copyright law. (LPTV stations did not exist at the time the statute was first written in 1976.)

This bill would codify the existing practices of the Copyright Office in calculating copyright royalty payments. Based on information from the Federal Communications Commission and the Copyright Office of the Library of Congress, CBO estimates that it will not affect the federal budget or the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER,
Director.

COMMITTEE VOTE

H.R. 3108 was reported favorably by voice vote, no objection being heard, and a quorum of Members being present.

APPENDIX I

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, October 1, 1984.

Hon. DAVID LADD,
Register of Copyrights, Washington, DC.

DEAR MR. LADD: We are writing to you in reference to provisions of section 111 of the Copyright Act and its potential effect on the carriage by cable systems of local signals of low power television. As you know, provisions of section 111 which define and distinguish "local" carriage and "distant" carriage were considered by Congress and the rules formulated prior to the introduction of low power service by the Federal Communications Commission. The distinction between "distant" and "local" is important because in most instances the royalty is computed on the basis of distant carriage.

It is our understanding that the Copyright Office may feel constrained by certain language in section 111 to classify the cable carriage of purely local low power television station signals as "distant" signals due to the fact that the Office might conclude that a signal must be subject to the FCC's must-carry rules before it could be considered local. This conclusion, of course, would result in carriage of these signals generating the same copyright liability as if they were "distant," thereby subjecting cable systems to the payment of significant royalties. Under such circumstances, we are informed that cable systems would be very reluctant to include low power stations within their complement of local services on a "may-carry" basis, which in turn would seriously damage the development and viability of low power television.

During the time that Congress was considering how section 111 should operate, all local television signals were subject to must-carry treatment and inclusion into the statute of a reference to FCC must-carry rules merely provided a convenient way to establish a clear dividing line between the "local" signals and the "distant" signals. The recent introduction of may-carry local low power signals was not contemplated at the time of passage of the Copyright Act of 1976, but Congress' intention was clear in wanting to distinguish between signals that were truly local and others that would be classified as distant. This was made manifest when, during consideration by the House of the Senate-passed bill, an amendment was added to mandate royalties for the carriage of signals when they were carried beyond the local coverage area of the station. Congress concluded that there would be no harm to copyright holders from such local carriage.

At a time in the near future, we intend to ensure that any ambiguity in the law is clarified by a technical amendment. Unfortunately, with a crowded legislative calendar and only a few days left in the 98th Congress, such an amendment is unlikely to occur this year. We believe, however, that an interim indication from the Copyright Office resolving any ambiguities in a manner to effectuate original intent can serve as a temporary solution to the problem.

Such an effort by the Copyright Office to resolve this problem will have our whole-hearted support. It will also be supported by Honorable Majority Leader Jim Wright and Senator Lloyd Bentsen, who have expressed personal interest in this issue.

Accordingly, we request you to consider the questions raised by this letter, and ask that you keep us apprised of your progress and any problems that might arise. if there is any way that we or our staffs can assist in this endeavor, please let us know.

In advance, thank you for your time and consideration.

Sincerely,

ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice.
CHARLES McC. MATHIAS, Jr.,
Chairman, Subcommittee on Patents,
Copyrights and Trademarks.

APPENDIX II

NOVEMBER 29, 1984.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn House Office Building, Washington, DC.

DEAR MR. KASTENMEIER: On October 1, 1984 you wrote to David Ladd, Register of Copyrights expressing certain views about the status of low power television (LPTV) signals under the cable compulsory license of 17 U.S.C. section 111. The Copyright Office held a public hearing on October 12, 1984 and received public comment through October 22, 1984. Your letter was made a part of the record of this proceeding.

The record discloses that owners of copyright, except for the National Association of Broadcasters, argued that under the Copyright Act definition of "local service area of a primary transmitter," the signal of an LPTV station must be classified as "distant" since the distinction between "local" and "distant" signals is frozen as of April 15, 1976 and LPTV stations have never been accorded "must-carry" status. Representatives of LPTV stations and cable system operators argued for a contrary interpretation of the Act. They argued that the Copyright Act's reference to the Federal Communications Commission's April 15, 1976 "must-carry" rules as the demarcation between "local" and "distant" signals was fundamentally based on geographic considerations, and the FCC's rules merely provided a convenient method of describing the geographic limits of local signals. Some members of the public advanced an alternative argument for classifying LPTV signals as "local." They asserted that LPTV stations should be viewed as "deregulated translator stations." Translator stations did exist on April 15, 1976 and were covered by the "must-carry" rules.

After reviewing the Copyright Act and its legislative history in connection with the divergent views expressed on the public record, including your letter of October 1, 1984, the Copyright Office has concluded that the status of low power television signals under the cable compulsory license is ambiguous. Accordingly, in examining cable Statements of Account, the Copyright Office will not question the determination by a cable system that a low power station's signal is "local" within an area approximating the normal coverage zone of such station.

A Notice of this policy decision was published in the Federal Register on November 28, 1984 at volume 49, pages 46829–31. A photocopy of the Notice is enclosed.

In your letter of October 1, 1984, you expressed the intention to clarify any ambiguity in the law by a technical amendment of the Copyright Act. The Copyright Office recommends such an amendment. We would be pleased to submit draft language, at your request.

Sincerely yours,

DOROTHY SCHRADER,
General Counsel.

Enclosure: Notice of LPTV policy decision.

[Docket RM 84–4]

CABLE COMPULSORY LICENSE; POLICY DECISION CONCERNING STATUS OF LOW POWER TELEVISION STATIONS

Agency: Copyright Office, Library of Congress.
Action: Notice of policy decision.
Effective date: November 28, 1984.

1. BACKGROUND

Section 111(c) of the Copyright Act of 1976, title 17 of the United States Code, establishes a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. This compulsory license is subject to various conditions, including the requirements that cable systems file Statements of Account semi-annually and pay statutory royalty fees in accordance with section 111(d)(2) and as adjusted by the Copyright Royalty Tribunal in accordance with section 801(b)(2).

Six years after the enactment of Section 111, the Federal Communications Commission (FCC) authorized the establishment of low power television stations entitled to originate programming. *See* 47 FR 21468 (1982), *on recon.*, 48 FR 21478 (1983). Since 1982, 117 low power television stations have gone on the air and an additional 259 construction permits have been granted. Lotteries for new construction permits are held every month; the FCC is expected to grant up to 4,000 of these permits.

The status of these low power television stations under the Copyright Act's definition of the "local service area of a primary transmitter" has been questioned. This definition establishes the demarcation between so-called "local" and "distant' signals under the cable compulsory license. This demarcation is critically important since large cable systems, whose semiannual gross receipts exceed $214,000, compute their copyright royalties beyond the minimum fee [1] on the basis of distant signal carriage (*i.e.*, the "distant signal equivalent" formula is applied).

The definition of local service area is found in section 111(f):

> The "local service area of primary transmitter," in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976. . . .

The Copyright Act was enacted in 1976; the relevant section 111(f) definition refers to the type of television broadcast station that the FCC required cable systems to carry on *April 15, 1976.* Under one interpretation of the Act, since the low power television station category did not exist in 1976, they can not be considered "must-carry" stations under the FCC rules in effect on April 15, 1976. Moreover, the FCC currently does not require cable retransmission of low power television stations. The distinction between local and distant signals found in 17 U.S.C. 111(f) is frozen as of the FCC's rules in effect on April 15, 1976. The Committee on the Judiciary explained that they used this date in the relevant section 111(f) definition since they believed "that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 99 (1976).

During the past year, representatives of cable systems have asked the Copyright Office whether these low power stations may be considered as "local" within the relevant definition of section 111(f). Reasoning from the language of the Act itself, the legislative history cited above, and the fact that the FCC did not choose to give these stations "must carry" status when they considered the matter, 48 FR 21475, 21482 (1983), the Copyright Office responded that low power television stations were not subject to the FCC's "must carry" rules and would presumably be classified as "distant" signals under the definition in 17 U.S.C. 111(f).

On September 25, 1984, various representatives of the low power television community asked the Copyright Office to reconsider its position on the status of low power television stations under the section 111(f) definition of "local service area of primary transmitter."

In response to the urgency of these requests, the Copyright Office held a public hearing on October 12, 1984, for the purpose of eliciting comment on the correct interpretation of the Copyright Act as it relates to the status of signals of low power television stations retransmitted by cable systems. Specifically the Copyright Office invited comment in two areas: (1) If a cable system retransmits a low power television signal, should the signal be characterized as "local" or "distant" for purposes of applying the distant signal equivalent value formula? If the response is that the signal should be considered "local," how are the limits of the station's "local service area" defined and by what authority? (2) If a cable system retransmits a low power television station on the basis of a voluntary license from the station and all owners of copyright in all copyrighted works transmitted by the low power television station have granted explicit voluntary licenses for the secondary transmission by cable, must the cable system nevertheless specify that carriage in its Statement of Account and pay copyright royalties under the compulsory license, (assuming the cable system retransmits at least one additional broadcast signal), or is the retransmission of such a low power television station outside the cable compulsory license since all copyright owners have consented voluntarily to the retransmission?

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[1] All cable systems pay a minimum fee for the privilege of making secondary transmissions, irrespective of gross receipts or actual distant signal carriage. 17 U.S.C. 111(d)(B)(i), (C) and (D).

2. SUMMARY OF THE HEARING AND COMMENT RECORD

At the October 12, 1984, hearing representatives from the American Low Power Television Association (ALPTA), Low Power Television, Inc., Community Broadcasters of America, Inc., Community Antenna Television Association (CATA), ACTS Satellite Network, Inc., American Christian Television System, Inc., and seven operators of low power television stations testified. The comment period was held open until October 22, 1984, and twenty-two comments were received. In addition to the comments submitted by those who testified at the hearing, comments were submitted by the Motion Picture Association of America (MPAA), Major League Baseball, the National Association of Broadcasters, Multivisions, Ltd., Bogner Broadcast Equipment, Times Mirror Cable Television, Inc., National Cable Television Association, and more individual operators of low power television stations.

a. Status of Low Power Stations. Everyone who testified at the October 12 hearing took the position that low power television stations should be considered local signals within section 111(f). Several different arguments were presented for reaching this conclusion. The ALPTA and other members of the low power community took the position that the interpretation given by the Copyright Office is not required by the statute and is inconsistent with congressional intent. In support of the ALPTA argument an October 1, 1984, letter to the Register of Copyrights from Representative Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice and Senator Charles McC. Mathias, Jr., Chairman of the Subcommittee on Patents, Copyrights and Trademarks, was introduced in which these Members of Congress expressed the view that when section 111 was enacted all local signals were subject to must carry status and may carry local low power signals were not contemplated, but "Congress' intention was clear in wanting to distinghuish between signals that were truly local and others that would be classified as distant." In this letter these Members of Congress indicate that any ambiguity in the law will be clarified by an amendment but ask the Copyright Office for "an interim indication . . . resolving any ambiguities in a manner to effectuate original intent . . ."

CATA argued that low power television is not a new service but an evolution and modification of the long standing television translator rules. To support this position CATA asserted that most of the rules governing translators also apply to LPTV stations. The same application forms are used by both, and a translator can convert to LPTV status by simply filing a letter asking for the authority to originate programming.

CATA minimizes the 1982 FCC decision that denied "must carry" status to LPTV stations by arguing that it is a post 1976 rule change that has no effect on the relevant definition in copyright law and that it was made as a result of the deregulation climate at the FCC.

In accord with their position that a LPTV station is a "deregulated translator," CATA stated that LPTV local service must be defined in the same manner that the local service area of a television translator was defined under the FCC rules in 1976. A determination of local status depends on whether the translator serves the cable community: the license so specifies, the signal is actually available, or the translator provides a "quality signal" to the cable community.

Representatives of Community Broadcasting and individual LPTV station operators testified concerning the need to obtain local status in order to be carried by cable systems.

Although no opposition to the ALPTA position was given at the October 12 hearing, during the comment period, representatives of copyright proprietors submitted statements in support of the interpretation originally given by the Copyright Office. The MPAA argued that if the statutory definition of "local service area" is disregarded, there will be no way to determine when a low power station is "local" and when it is "distant."

Responding to CATA's translator argument, Major League Baseball asserted that some translator stations did not have "must carry" rights under the April 15, 1976, FCC rules and that Copyright Office should not consider LPTV stations as "deregulated translators" since the FCC had not adopted such a construction. Finally, they argued any decision that carriage of a LPTV signal receivable off-the-air within a thirty-five mile zone is royalty-free must be made by Congress.

Other commentators supported the ALPTA position. Times Mirror Cable Industry, Inc. agreed with ALPTA that a ruling that locally broadcast LPTV signals are "local" under § 111 could be based upon the statutory language. Times Mirror argued that a LPTV station is a broadcast station whose signal is subject to compulsory licensing under section 111(c) but that its signal is not the signal of a "television broadcast station" for the purpose of defining the "local service area" in section 111(f). Times Mirror reached this conclusion by maintaining that "television broadcast station" in section 111(f) is a term of art referring to full power television stations. Times Mirror also observed that section 111(f) provides an alternative for defining the local service area of broadcast stations which do not possess mandatory carriage rights, *e.g.*, radio stations; that the FCC "must carry" rules for translators do not specifically define the local service area; and that the local area served for LPTV could be determined in the same way. Alternatively, Times Mirror argued that LPTV could at least be treated as local broadcast stations when carried by cable systems in their community of license and any other community served from the same headend.

Multivisions, Ltd. took the position that the Copyright Office's interpretation ignored the "common sense" of the statute, was overly simplistic, and at odds with the probable congressional intent. To support this position Multivisions quoted from the Seventh Circuit Court of Appeals opinion that the courts should "interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than . . . narrowly and so force Congress periodically to update the act." *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 685 F.2d 218 (7th Cir. 1982), *rehearing denied* 693 F.2d 628. Multivisions asserted that the "mechanistic application of a 'distant' lable to all LPTV signal carriage would be at odds with the intent of the Copyright Act."

The comments submitted by the National Association of Broadcasters (NAB) and individual cable operators supported the ALPTA argument that LPTV signals should be classified as "local" without elaborating on it. Both NAB and several of the operators did suggest that this "local" classification should apply only in an area approximating the normal coverage zone of such stations.

b. *Retransmission Consents.* As to the second issue, all of the witnesses and commentators agreed that retransmission licenses could be negotiated, and royalties therefrom would substitute for compulsory license royalties for the particular signal for which consent had been secured. The MPAA wrote that such consents are a "practical, marketplace solution." As the hearing, however, LPTV operators testified that acquiring all of the consents necessary was a long and arduous procedure.

3. POLICY DECISION—STATUS OF LOW POWER TELEVISION SIGNALS

Having reviewed the statute and the legislative history in connection with an examination of the divergent views presented at the October 12 hearing and during the comment period and having noted the Kastenmeier-Mathias letter, the Copyright Office has concluded that the status of low power television stations under the cable compulsory license of the Copyright Act is ambiguous. Consequently, the Copyright Office will take a neutral position on this specific issue, awaiting the legislative clarification mentioned in the letter from Senator Mathias and Representative Kastenmeier. In examining Statements of Account, therefore, the Copyright Office will not question the determination by a cable system that a low power station's signal is "local" within an area approximating the normal coverage zone of such station.

a. *Retransmission Consent.* On the second issue presented in the September 25 ALPTA letter, opposing interests presented uniform responses that cable systems may carry low power television stations pursuant to negotiated retransmission consents. There was no suggestion that this could not be done outside the compulsory licensing provisions of section 111. If copyright owners and cable systems uniformly agree that negotiated retransmission consents supersede the compulsory license requirements, the Copyright Office has no reason to question this interpretation provided that the negotiated license covers retransmission rights for all copyrighted works carried by a particular broadcasting station for the entire broadcast day for each day of the entire accounting period. Since it appears that the negotiated license would supersede the compulsory license under these circumstances, cable systems would not have to take account of the signal of the low power television station for which the copyright owners' consents have been obtained in paying copyright royalties.

(17 U.S.C. 111, 702)

Dated: November 19, 1984.

Dorothy Schrader,
Associate Register of Copyrights for Legal Affairs.

Approved by:

Daniel J. Boorstin,
The Librarian of Congress.

[FR Doc. 84-31168 Filed 11-27-84; 8:45 am]

BILLING CODE 1410-03-M

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, as shown as follows new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Section 111 of Title 17, United States Code

§ 111. Limitations on exclusive rights: Secondary transmissions

(a) Certain secondary transmissions exempted

* * * * * * *

(f) Definitions

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of primary transmitter", in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. *In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the local service area of a primary transmitter comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 20 miles.* The "local service area of a private transmitter", in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

* * * * * *

○

Public Law 99-397
99th Congress

An Act

Aug. 27, 1986
[H.R. 3108]

To amend title 17, United States Code, to clarify the definition of the local service area of a primary transmitter in the case of a low power television station.

Communications and telecommunications.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fourth paragraph of section 111(f) of title 17, United States Code, relating to the definition of local service area of a primary transmitter, is amended by adding after the first sentence the following new sentence: "In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the 'local service area of a primary transmitter' comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 20 miles.".

SEC. 2. (a) Section 111(d) of title 17, United States Code, is amended—

(1) in paragraph (3) by striking out "clause (2)" and inserting in lieu thereof "paragraph (1)";

(2) in paragraph (2) by striking out "clause (5)" and inserting in lieu thereof "paragraph (4)";

(3) in paragraph (2)(B) by striking out "clause (5)" and inserting in lieu thereof "paragraph (4)";

(4) by striking out paragraph (1); and

(5) by redesignating paragraphs (2), (3), (4), and (5) as paragraphs (1), (2), (3), and (4), respectively.

(b) Section 111(f) of title 17, United States Code, is amended by striking out "subsection (d)(2)" in the third undesignated paragraph defining a cable system and inserting in lieu thereof "subsection (d)(1)".

(c) Section 801(b)(2) of title 17, United States Code, is amended by striking out "111(d)(2)(B)" each place it appears and inserting in lieu thereof "111(d)(1)(B)".

(d) Section 801(d)(2)(D) of title 17, United States Code, is amended by striking out "111(d)(2) (C) and (D)" and inserting in lieu thereof "111(d)(1) (C) and (D)".

Approved August 27, 1986.

LEGISLATIVE HISTORY—H.R. 3108:

HOUSE REPORTS: No. 99-615 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 132 (1986):
  July 28, considered and passed House.
  Aug. 9, considered and passed Senate, amended.
  Aug. 15, House concurred in Senate amendments.

○

APPENDIX III

MATERIALS RELATING TO EARTH STATION/COPYRIGHT PROVIDED BY THE WITNESSES

NINETY-EIGHTH CONGRESS

PETER W. RODINO, JR. (N.J.), CHAIRMAN

JACK BROOKS, TEX.
ROBERT W. KASTENMEIER, WIS.
DON EDWARDS, CALIF.
JOHN CONYERS, JR., MICH.
JOHN F. SEIBERLING, OHIO
ROMANO L. MAZZOLI, KY.
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E. CLAY SHAW, JR., FLA.
GEORGE W. GEKAS, PA.
MICHAEL DeWINE, OHIO

U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515
Telephone: 202-225-3951

GENERAL COUNSEL
M. ELAINE MIELKE

STAFF DIRECTOR
GARNER J. CLINE

ASSOCIATE COUNSEL
ALAN F. COFFEY, JR.

November 27, 1984

The Honorable David Ladd
Register of Copyrights
Copyright Office
Washington, D.C. 20540

Dear Mr. Ladd:

As you know, the use of satellites for the transmission of motion pictures, television and radio programming, sporting events, data and other information services has increased dramatically during this decade. While most of these transmissions have been of a "private" nature, directed to fixed points and intermediary distributors for further delivery to the public, direct broadcast satellites intended for individual home reception are now coming on the scene.

The changing technologies of satellite distribution raise a variety of copyright, telecommunications, foreign and domestic policy concerns. We discussed some of these issues at the Copyright Office's Congressional Symposium on Copyright and Technological Change.

The 98th Congress began the process of establishing the foundation for satellite policy through the following actions:

(1) Amending the Communications Act of 1934 concerning the home reception of unencrypted and encrypted satellite cable programming;

(2) Imposing conditions on beneficiary states under the Caribbean Basin Economic Recovery Act regarding the rebroadcast of U.S. satellite-delivered programming; and

(3) Ratifying the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Satellite Convention).

Honorable David Ladd
Page Two
November 27, 1984

During the 99th Congress, the Subcommittee on Courts, Civil Liberties and the Administration of Justice will explore many of the copyright issues embracing satellite transmission, particularly in the area of direct broadcast satellites. The Copyright Office can be of assistance to the Subcommittee by commencing work now on developing an agenda of satellite issues which touch on copyright policy for consideration during 1985.

Sincerely,

Bob Kastenmeier

ROBERT W. KASTENMEIER
Chairman,
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:mrs

The Register

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20540

October 8, 1985

The Honorable
Robert Kastenmeier
House of Representatives
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Kastenmeier:

This responds to your request for the views of the Register of Copyrights about copyright policy issues which arise from the transmission by satellite of copyrighted programming.

Satellite technology has already had an enormous impact on the delivery of copyrighted works to the public and consequently upon the marketing and licensing arrangements for the performance of these works. The widespread use of satellite technology also makes the programming vulnerable to signal piracy. The 98th Congress responded to concerns about signal piracy by amending the communications law and by ratifying the Brussels Satellite Convention.

The attached report briefly lists several copyright policy issues related to satellite technology; reviews the existing protection under the copyright and communications laws against program infringement or signal piracy and notes the copyright policy issues implicit in sections 633 and 705 of the Communications Policy Act of 1984. It also describes briefly the existing satellite technology and the methods of transmitting copyrighted works by satellite.

I trust this report responds fully to your request, but if further information or views are needed please let me know.

Sincerely,

Ralph Oman
Register of Copyrights

COPYRIGHT POLICY ISSUES ARISING FROM THE TRANSMISSION BY SATELLITE OF COPYRIGHTED WORKS

I. SUMMARY LIST OF COPYRIGHT POLICY ISSUES

A. Unauthorized private reception

1. Background:

Under traditional copyright law, no liability exists for the private performance of works. Broadcasting, whether by conventional Hertzian wave or by satellite, is a public performance if the public is capable of receiving the performance, even though reception occurs in private. Moreover, the reception of a performance, in a public place, or the further distribution of the performance, infringe the copyright in the work performed, unless there is a specific exemption, such as 17 U.S.C. 111(a)(1) or 110(5). Mere reception of a performance in a private home, however, is not an act of copyright infringement under existing copyright law. Satellite delivery of copyrighted works either by direct broadcasting or satellite-to-cable, means that the signal containing copyrighted works may be intercepted by persons in the United States or abroad who are not part of the copyright owner's intended audience.

2. Policy issues:

To what extent should the copyright law protect authors and owners of copyright against the unauthorized reception in private of copyrighted works? Should the concept of public performance be adjusted in any way? If so, what limitations, if any, should be placed upon the exercise of the redefined right?

B. Scrambling of signals

1. Background:

To protect themselves against signal piracy, some satellite programming services have started to, or intend to, scramble their signals. The cable industry is reportedly searching for a single, compatible system to scramble all signals. The Communications Policy Act of 1984 (Cable Act) encourages the development of scrambling systems as one means of gaining protection under the communications law.

On the other hand, some members of the public believe they have the right to receive satellite programming, and legislation has been introduced to declare a moratorium on the scrambling of signals or to establish a compulsory license permitting access to signals. H.R. 1769 and H.R. 1840 have been introduced in this Congress to amend the new provisions of the Cable Act on interception and receipt of satellite cable programming for private viewing. H.R. 1769 would amend the Communications Act by imposing a two-year ban on the encryption of satellite cable programming. The stated purpose of the bill would be to allow time for the establishment of effective licensing systems before encryption becomes well-established. (Some cable programming services such as HBO are in the midst of establishing scrambling systems.)

H.R. 1840 would vest the FCC with broad, new authority to create a compulsory license for the private viewing of scrambled satellite signals. The FCC would set the prices, terms, and conditions for the receipt of such signals. The bill would also prohibit price discrimination against backyard dish owners compared with cable subscribers and would prohibit any practices that would force dish owners to lease or purchase decoding equipment from particular authorized sources.

2. Policy issues:

To what extent, if any, should the copyright law be amended to ensure public access to satellite-delivered copyrighted works? If any compulsory license is appropriate to assure access to satellite signals, under what terms and rates of compensation to copyright owners should the license apply? In addition to copyright owners, would cable system operators or cable programming services share in any compensation from such a compulsory license, and, if so, what shares would be appropriate? What mechanisms would be adopted for the collection and distribution of compulsory license fees?

C. Piracy of U.S. signals in foreign countries

1. Background:

Unauthorized interception and distribution in foreign countries of U.S. satellite signals containing copyrighted works has been a matter of concern by U.S. interests for many years. The problem is particularly acute in the Caribbean area, Central America, and Canada to the extent these areas fall within the "footprint" of U.S. domestic satellites, transmitting programming to the United States public. Ratification of the Brussels Satellite Convention may encourage other countries to join the Convention and protect against unauthorized distribution of signals. The Convention provides only narrow protection, however, since it does not protect against mere unauthorized interception of signals. U.S. copyright owners have sought and obtained provisions in trade legislation and the Caribbean Basin Initiative which require some assurance by the foreign beneficiaries of the legislation that they adequately protect U.S. intellectual property, including copyrights. It is characteristic of this kind of legislation that it requires reciprocal protection of copyrights, whereas both international copyright conventions are based upon the principle of national treatment, subject to certain minimum obligations. (Reciprocal arrangements theoretically require equal protection, but in practice equality is difficult to achieve; national treatment theoretically may result in "unequal" protection in one country in relation to another, but in practice, since foreigners are treated the same as nationals, national treatment usually leads to higher and more uniform levels of protection.)

2. Policy issues:

To what extent do the existing international copyright conventions and the Brussels Satellite Convention afford adequate protection for U.S. copyrighted works against unauthorized reception and distribution of satellite signals? Do trade-based reciprocal measures hold significant promise for ensuring adequate protection for U.S. copyrighted works in foreign countries, or are they less promising in the long-run than efforts to ensure full compliance with existing copyright and satellite conventions and efforts to encourage wider acceptance of these conventions? Should U.S. efforts be directed toward development of domestic copyright and communications law policies that would ensure full compensation for satellite transmission of copyrighted works at the source of the transmission?

D. Copyright law implications of the Cable Communications Policy Act of 1984

1. Background:

The Cable Communications Policy Act of 1984 (Pub. L. 98-549) established a comprehensive federal statutory framework for cable operations in the United States. The law establishes two property-type rights in program services, contains general language that purports to safeguard the rights of copyright owners, and contains other features that may impact the Copyright Act. For example, although the Copyright Act contains its own definition of cable system, it was originally drawn from communications law and FCC policies.

2. Policy issues:

To what extent will the new communications law definition of "cable system" impact on the Copyright Act? Would a satellite carrier be deemed a "cable system" under the new definition when it retransmits cable originated programming directly from direct broadcast or fixed satellites to home earth stations? Would satellite resale carriers be deemed cable systems if they develop marketing systems for direct private reception? Will the FCC continue to classify "superstations" as broadcast stations? To what extent will the terms "cable channel," "cable operator," "cable service," "activated channels," "video programming," and "service tier" impact on the Copyright Act?

E. Regulation of programming and other services not considered "cable services"

1. Background:

While the Cable Act improves considerably the legal structure for the furnishing of "cable services," it does not include within the meaning of that term "'active' information services such as at-home shopping and banking that allow transactions between subscribers and cable operators or third-parties. Similarly, a cable service may not provide subscribers with the capacity to communicate instructions or commands to software programs such as computer or video games or statistical packages that do not retrieve information and that are stored in facilities off the subscribers' premises."1/

2. Policy issues:

When reviewing the copyright protection of works embodied in "cable services," it may be opportune to consider other information services that may be provided by cable systems and, perhaps, eventually common carriers. For example, the nature and scope of protection for copyrighted databases has been questioned in

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1. House report, at 42; see also Final rule, 50 Fed. Reg., at 18639.

recent litigation. What constitutes a "fair use" in connection with "factual" works is unsettled. See, e.g., Harper & Row v. Nation Enterprise, No. 83-1632, slip op., at 8 (U.S. May 20, 1985). The application of the exclusive rights in §106 of the 1976 Act, as well as limitations on these rights, such as that in §110(5), to new methods of transmission could usefully be studied further.

II. LEGAL PROTECTION FOR SATELLITE-DISTRIBUTED PROGRAMMING UNDER THE EXISTING COPYRIGHT ACT AND THE 1984 AMENDMENTS TO THE COMMUNICATIONS ACT

A. Protection for program suppliers under the Copyright Act

1. Exclusive rights

One of the exclusive rights granted to owners of copyright is the right of public performance. 17 U.S.C. 106(4). The terms "perform" and "publicly" are broadly defined in 17 U.S.C. 101, to include the transmission of a performance by any means to the public, including satellites. The Copyright Act contains certain exceptions to the right of public performance, of which the most relevant are the exemptions of sections 110(5) and 111(a), and the cable compulsory license, section 111(c)-(f).

The satellite-distribution of copyrighted programming is now commonplace, either by satellite to broadcast station, or satellite to cable, links. Direct satellite broadcasting (DBS) has been authorized by the FCC, but the medium has not proved commercially viable yet.

A public performance takes place when a copyrighted work is transmitted to the public via satellite. In general, the emitting organization (a broadcast station, or a broadcast or cable program service network) is subject to full liability under the Copyright Act for authorizing the public performance. Therefore these program services occur under license from the owner of copyright. Section 111(b) of the Copyright Act provides that cable originated programming (such as HBO, ESPN, and CNN) is subject to the copyright owner's exclusive right of public performance.

The reception and communication to the public of a performance in a public place (for example, by turning on a radio or television attached to commercial sound speakers) is a public performance and subject to liability unless one of the specific exceptions applies. The further distribution of a performance of a copyrighted work in public is also a public performance. Under these principles, the reception of satellite-distributed nonbroadcast services in a bar, motel or hotel is apparently an infringement of copyright. (The lodging exemption of section 111(a) does not apply to nonbroadcast programming.) On the other hand, the private reception of a signal in a private home and without further communication to the public, would not be an infringement of copyright, since the performance is not public; this is true even if the reception is unauthorized by the copyright owner.

2. Cable compulsory license

The retransmission of broadcast programming by a cable system is subject to the compulsory license of section 111. The statute sets the terms and rates of compensation; the rates are subject to adjustment by the Copyright Royalty Tribunal. The compulsory license can be invoked in carrying a "superstation" transmitted from the broadcasting facility via satellite and then distributed to cable systems. Satellite resale carriers licensed by the FCC have been held exempt from any copyright liability for their retransmission activity under 17 U.S.C. 111(a)(3) ("passive common carrier" exemption).

The Copyright Act does not grant cable system operators any remedy against "theft-of-cable service" since they are neither the creators nor the owners of the copyrighted programming they transmit.

B. Protection for program suppliers and cable operators under the Communications Policy Act of 1984.

The Cable Communications Policy Act of 1984 (Cable Act) among other major achievements, created two new private rights of action (property rights in effect) under the communications law to protect against unauthorized private reception of satellite signals under certain circumstances, and to protect against theft of cable service whether the signal is relayed by satellite or terrestrial means.

1. Unauthorized Reception of Cable Service: Section 633.

Section 633(a)(1) of the Cable Communications Policy Act of 1984 (Cable Act) prohibits any person from intercepting or receiving "any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law."[2] While former §605 of the Communications Act of 1934 also included a prohibition against the unauthorized reception of communications services, new §633 of the Cable Act is particularly tailored to the theft of cable services, and provides criminal penalties and civil remedies for violations of that section. Former §605 of the 1934 Act did not contain specific remedies for such violations.

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[2] Cable Communications Policy Act of 1984, Pub. L. 98-549, 98th Cong., 2d Sess., sec. 2, §633 (to be codified at 47 U.S.C. §633).

Since there may be cases of theft of cable service that are not covered by §633, it is noted in the relevant legislative history that: "Nothing in this section [§634, H.R. 4103, became §633, Cable Act] is intended to affect the applicability of existing Section 605 to theft of cable service, or any other remedies available under existing law for theft of service."3/ While it is not clear at this point which cable services would remain covered by §605, now §705, of title 47 U.S.C., the legislative history of new §633 stresses that the phrase "service offered over a cable system" limits "the applicability of this section to theft of service from the point at which it is actually being distributed over a cable system. Thus, situations arising with respect to the reception of services which are transmitted over-the-air (or through another technology), but which are also distributed over a cable system, continue to be subject to resolution under section 605 to the extent reception or interception occurs prior to or not in connection with, distribution of the service over a cable system."4/

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3. *Report on H.R. 4103 of the House Committee on Energy and Commerce*, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 83 (1984) (hereinafter cited as *House Report*). Both the Senate and House of Representatives adopted the explanations in H.R. Rep. No. 98-934, with certain amendments. *See Cable Telecommunications Act*, 130 *Cong. Rec.* S 14285 and H 12235 (daily ed. Oct. 11, 1984).

4. *Id.*

Although the term "cable service" is defined in §602(f) of the Cable Act, the meaning of the phrase "communications service" used in §633(a)(1) is not clear. The legislative history sheds some light on this concept. The House Report states that the term "any communications service" includes, for example, "audio, video, textual, data or other service offered over a cable system, including any material transmitted to or from a subscriber over a cable system that has interactive capability."5/ The phrase "any communications service" appears broader than "cable service." As defined in §602, "cable service" is restricted primarily to one-way transmission to subscribers, and only such subscriber interaction as may be required for the selection of the video programming or other programming service. "Communications service" apparently covers any material transmitted over a cable system having interactive capability.

The prohibition in §633 also extends to a person assisting in the interception or receipt of a communications service. Section 633(a)(2) defines the term "assist in intercepting or receiving" to include "the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system . . .." According to the

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5. Id.

House Report, it was not the intent of Congress to subject manufacturers, distributors or retailers to liability under that section if they do not provide a device or equipment "with the intent or specific knowledge that it will be used for the unauthorized reception of cable service."[6] The primary aim of subsection (a)(2) is to prevent the manufacture and distribution of so-called "black boxes" and other unauthorized converters which permit reception of cable services without payment.[7]

Penalties or remedies for violations of the prohibition in §633(a)(1) are set forth in subsections (b) and (c). The section also provides generally that any State or franchising authority may enact or enforce laws with respect to the unauthorized interception or reception of any cable or other communications service, even if the laws impose higher penalties or sanctions. The criminal penalties for violations of subsection (a)(1) of §633 are graduated. Any person who willfully violates the section may be fined not more than $1,000 or imprisoned for not more than 6 months, or both. Where the violation is not only willful, but for purposes of commercial advantage or private financial gain,[8] the person is subject to a fine of not more than

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6. Id. at 84.

7. Id.

8. Id. The legislative history of §705 contains explanatory

$25,000 or imprisoned for not more than 1 year, or both, for the first offense, and not more than $50,000 or imprisoned for not more than 2 years, or both, for any subsequent offense.[9] In this respect, the House Report observes that "[t]he increased penalties triggered by willful violations committed for purposes of commercial advantage or private financial gain are designed in part to reach the production of devices, or sale of equipment or services, intended for unauthorized reception of services provided over a cable system."[10]

With respect to civil remedies, a "person aggrieved" by a violation of §633(a)(1) may bring a civil action in a U.S. district court or in any other court of competent jurisdiction. In light of the broad language of §633(c)(1): "Any person aggrieved by any violation of of subsection (a)(1) may bring a civil

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language in connection with the phrase "private financial gain." 130 Cong. Rec. S 14285 (daily ed. Oct. 11, 1984). Further, the term is defined in §705(b)(5) as excluding "the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use." Courts may look to this definition for guidance in interpreting the same term in §633 of the Cable Act.

[9] An amendment was made to a similar provision in §705. The word "offense" was changed to "conviction" in §705(d)(2) "in order to clarify that more than one conviction, and not a single conviction on more than one violation, is what triggers the applicability of the higher criminal penalties (which provide up to a $50,000 fine and 2 years imprisonment)." 130 Cong. Rec. S 14281, S 14286 (daily ed. Oct. 11, 1984). Although the change was not made in §633, it may be argued that the intent was the same.

[10] Id.

action . . .," it appears likely that both copyright owners and cable operators may have standing to enforce this new provision. It is not clear, however, whether the clause "as may otherwise be specifically authorized by law" in subsection (a)(1) was intended to cover rights under the Copyright Act of 1976. The meaning of the term "any person aggrieved" was discussed in connection with the use of the term in §705(d)(3)(A) of the Cable Act. In that context, the term was viewed as covering owners of rights in programming as well as senders of the signal embodying the programming.[11]

Civil remedies available under subsection (c) include temporary and final injunctions, actual or statutory damages, and full costs, including attorney's fees. With respect to the amount of damages, where a court finds that a violation was committed willfully and for purposes of commercial advantage or private financial gain, the court may increase the award of either actual or statutory damages to $50,000. In the event the court finds a violator was not aware and had no reason to believe that his acts constituted a violation of §633, the court may reduce the award to not less than $100.

2. Unauthorized Reception of Certain Communications: Section 705.

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[11] See 130 Cong. Rec. S 14288 and H 12238 (daily ed. Oct. 11, 1984).

Specific provision has now been made in the Communications Act of 1934 for the protection of "satellite cable programming."[12] As defined in new §705(b), "the term 'satellite cable programming' means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." Under the scheme adopted in §705 of the Cable Act, any individual is free to intercept or receive any satellite cable programming for private viewing if the programming involved is not encrypted, and a marketing system has not been established as provided in that section. Satellite cable program suppliers are given a clear choice by this new provision: scramble their signal, or establish a marketing system for authorizing private viewing. The legislative history elaborates on the terminology used in new §705(b). With respect to the phrase "private viewing" as used in that provision, it is noted that the term does not include "any retransmission by so-called 'private cable' or 'satellite master antenna television' systems. Nor is it contemplated that an individual may redistribute programming received by his satellite equipment to the homes or residences of his neighbors.

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[12] The Cable Act amends the Communications Act of 1934 by redesignating former §605 as §705, and inserting "(a)" after the section designation. The Act also adds new subsections (b)-(e) at the end of the existing section.

Nor is it contemplated that 'private viewing' includes display of satellite cable programming in the public area of an apartment building, condominium, or housing complex, or in taverns, restaurants or fraternal halls."[13] Further, the interception of the "satellite cable programming" must be directly from the satellite feed to come within the scope of §705(b).[14]

The exemption §705(b) applies only where the video programming transmitted via satellite is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers. With respect to closed-circuit sports and special events transmissions, it is noted in the legislative history of that provision that:

> Closed-circuit sports and special events transmissions, whether on a regular or ad hoc basis may be primarily intended for viewing by paying customers in public places where local promoters have acquired public performance rights (e.g., movie theaters, stadia, or public performance halls). If the sender of such a transmission licenses retransmission rights to certain cable operators, one must look to the facts of the case to determine whether this is the "primary" intent of the sender.[15]

The Cable Communications Policy Act of 1984 does not clarify the threshold issue of what communications are covered by §705 in the first place. Section 705(a)

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[13] 130 Cong. Rec. H 12238 (daily ed. Oct. 11, 1984).

[14] Id.

[15] Id.

[former §605] provides that: "This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public . . . ."[16] The new satellite cable programming scheme in §705(b)-(e) would not come into play where the programming is "transmitted by any station for the use of the general public." In determining the meaning of the exclusionary language in §705(a) of the Cable Act, it is helpful to look to the construction of former §605 of the Communications Act of 1934. Congress observed in the legislative history of the Cable Act that former §605 provided "broad protection against the unauthorized interception of various forms of radio communications," and that there was no intent to alter "those broad protections."[17]

Case law construing former §605 of the Communications Act of 1934 applied that section to subscription television, multipoint distribution and other transmission services. An earlier decision, that was recently cited by the Court of Appeals for the D.C. Circuit in reviewing the FCC's interim direct broadcast satellite regulations,[18] involved restrictions placed on the operation of a subscription music service by FM licensees.[19] In Functional Music, the court did not agree with the FCC's finding that the activities of the functional music operators constituted point-to-point communications. Referring to the definition of broadcasting in the 1934 Act, the court stressed that Functional Music's programming was of interest to the general radio audience and was specifically transmitted with the intent to reach the public generally. As noted in the DBS context, "the test for whether a particular activity constitutes broadcasting is whether there is 'an intent for public distribution' and whether the programming is 'of interest to the general . . . audience.'"[20] The FCC is currently reviewing the application of its broadcast regulations to STV, MDS, DBS and other transmission services. If the FCC initiates a regulatory proceeding on this issue, there may be an opportunity to address the meaning of transmission for the use of the general public for purposes of §705(a).

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[16] Section 605, now §705(a), was revised in 1982; the term "broadcast" was deleted. See 47 U.S.C. §605 (1982).

[17] 130 Cong. Rec. S 14287 and H 12237 (daily ed. Oct. 11, 1984).

[18] See National Ass'n. of Broadcasters v. F.C.C., 740 F.2d 1190

(D.C. Cir. 1984).

[19] Functional Music, Inc. v. F.C.C., 274 F.2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959); see also Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980); and National Subscription Television v. S & HTV, 644 F.2d 820 (9th Cir. 1981).

[20] National Ass'n. of Broadcasters, supra, 740 F.2d at 1201.

Unlike former §605, provision has been made in amended §705 for criminal penalties and civil remedies for violations of the protections afforded by that section. Section 705(e) added by the Cable Act to the Communications Act of 1934, title 47 U.S.C., also provides that the specific remedies in §705 do not "affect any right, obligation, or liability under title 17, United States Code, any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law." With the exception of the change of the word "conviction" for "offense" in §705(d)(2), the penalties and remedies under §705 are generally the same as those described above in connection with §633. Unlike §633, however, the legislative history of §705(d)(3)(A) states clearly that owners of rights in intercepted radio communications, and not just the sender of the signal, may be a "person aggrieved" by violations of §705(a). Section 705(d)(4) does add a new remedy. This provision subjects "the importation, manufacture, sale, or distribution of equipment by any person with the intent of its use to assist in any activity prohibited by subsection (a) [of §705]" to the same penalties and remedies as a person who has engaged in such prohibited activity.

It is provided in §705(e) that the copyright law is not affected by that section, and the issue of who may authorize the reception of an unencrypted signal for private viewing continues to be governed by existing copyright law and contract.[22] With respect to the savings clause in §705(e) [then(d)], Congress observed that "the adoption of this provision is not intended to affect the legal status under copyright law of any technological device. Further, there is no intent being expressed with respect to the question of whether equipment capable of receiving satellite cable programming is to be considered a receiving apparatus for purpose of an exemption under 17 U.S.C. 110(5)."[23]

III. SATELLITE TECHNOLOGY AND ITS USE IN THE DISTRIBUTION OF COPYRIGHTED WORKS

Since the passage of the Copyright Act of 1976, developments in satellite technology and changes in FCC communications policy have had a marked impact on the way in which the American public receives television programming. "Superstations" like WTBS (Atlanta) or WOR (New York) are distributed nation-wide via satellite to cable links. A galaxy of new cable origination services have been created and marketed via satellite to cable systems. Radio and television broadcast networks make increased use of satellites to distribute programming to their affiliates.

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[22] 130 Cong. Rec. H 12238 (daily ed. Oct. 11, 1984).

[23] Id. at H 12239.

Only some of these developments were contemplated in 1976; their impact on the market for televised programming is substantial. Direct satellite broadcasting, however, although initially promising, has not proved commercially viable to date.

A. Regulatory framework.

The framework within which the FCC authorizes the operation of fixed-satellite and broadcasting-satellite services is the International Telecommunications Convention. Frequency allocations for these services must comply with the technical requirements set forth in the Convention, Radio Regulations and other relevant agreements. Article 23 of the ITU Convention requires administrations to assure the secrecy of radiocommunications.[24] The secrecy obligations of the U.S. under the Convention are generally covered in §705 [former §605] of the Communications Act of 1934 on the unauthorized publication or use of communications. With respect to the reception and use of television and radio programming that is not transmitted for the use of the general public, section 705(a) prohibits generally any unauthorized person from receiving or assisting in the receipt of any interstate or foreign communication by radio and using such communication therein for his own benefit or for the benefit of another not entitled thereto.[25]

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[24] For text of article 23, see Final Acts of the World Administrative Radio Conference (Geneva, 1979), reprinted in Message from the President of the United States, Tr. Doc. No. 97-21, 97th Cong., 1st Sess., at 241 (1981) (Treaty was ratified by the U.S. on Sept. 6, 1983).

B. Current FCC Authorizations.

Of the thirteen space services listed in the International Telecommunications Union's (ITU) Table of Frequency Allocations, only two are currently of general interest in the distribution of copyrighted works embodied in television or radio programming: Fixed-Satellite Service (FSS); and Broadcasting-Satellite Service (BSS).[26] Geostationary satellites whose orbit remains approximately fixed relative to the Earth's equator are used to transmit both FSS and BSS for reception in the continental United States, the 48 contiguous States (Conus).[27] There is a direct correlation between the power radiated by a space station located on a geostationary satellite and the size and complexity of the antenna used to receive the signal on the earth's surface. The higher the satellite power, the smaller the dish antenna

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25. *See* Cable Communications Policy Act of 1984, Pub. L. 98-549, 98th Cong., 2d Sess., sec. 5, §705(a) (to be codified at 47 U.S.C. §705(a)) (hereinafter cited as "Cable Act").

26. *See* *First Advisory Committee Report*, ITU WARC ORB 1985, at 2-1 (1985).

27. For definitions of terminology used in connection with space services, see 47 C.F.R. §2.1 (1984).

required for reception. A recently launched satellite, GTE Spacenet's GSTAR I, is capable of delivering five channels of service to one-meter or 1.2-meter dishes.[28]/

Current operational domestic satellite systems in the FSS are authorized by the Federal Communications Commission (FCC) to use the frequency band from approximately 4 to 6 GHz (C-Band); and the bands from 11.7-12.2 GHz and 14-14.5 GHz (Ku-Band).[29]/ Satellites in the C-Band usually have about 24 transponders, while those in the Ku-Band approximately 16 transponders. The number of transponders on a satellite is generally determined by the total available bandwith and by the frequency re-use plan. With respect to BSS, the FCC regulations provide for limited sharing of the frequency band 11.7-12.2 GHz between FSS and BSS.[30]/ Provision has also been made for the use of the band 17.3-17.8 GHz by the fixed-satellite service for the purpose of providing feeder links to the broadcasting-satellite service.[31]/ Fixed-satellite service is generally a radiocommunication service between earth stations at specified fixed points. In some cases, the service includes satellite-to-satellite links.

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[28] *The search for ubiquity in television*, *Broadcasting*, at 52, 56 (July 8, 1985).

[29] 47 C.F.R. §2.106 (1984). For list of C-Band and Ku-Band satellites now operational, see *Where the Birds are*, *Broadcasting*, at 50 (July 8, 1985) (*Exhibit 1*). The FCC discourages the use of terms C-Band and Ku-Band since they are not a very accurate way to describe frequency allocations.

[30] 47 C.F.R. §2.106 and NG145 (1984).

[31] *Id*. at NG140.

In anticipation of the 1983 Regional Administrative Radio Conference, the FCC adopted policies and rules for the authorization, on an experimental basis, of direct broadcast satellite service (DBS). Unlike the FSS, signals transmitted or retransmitted by space stations in the DBS service are intended for reception at multiple receiving points. In its *Report and Order* of June 23, 1982, the FCC viewed DBS service as "a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, inexpensive earth terminals."[32] The FCC amended its Table of Frequency Allocations contained in Part 2 of its regulations to permit DBS downlink operations in the 12.2-12.7 GHz band and uplink operations in the 17.3-17.8 GHz band.[33] The FCC examined the record in that proceeding and concluded that DBS could provide extremely valuable services to the American people. It found that the "possible benefits of the service include the provision of improved service to remote areas, additional channels of service throughout the country, programming offering more variety and that is better suited to viewers' tastes, technically innovative service, and expanded non-entertainment service."34/ The FCC's DBS Order was reviewed by the Court of Appeals for the D.C. Circuit in an action brought by the National Association of Broadcasters. The court commended the FCC on its regulatory accommodation of this new technology and generally upheld the FCC's frequency allocation for DBS and other aspects of its interim DBS regulations. With respect to the application of certain broadcasting requirements ~~to~~ this new form of satellite service, however, the court vacated the portion of the DBS Order "that makes broadcast restrictions inapplicable to some DBS systems. . .."35/

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[32] *Report and Order* in Doc. No. 80-603, 90 F.C.C.2d 676, 677, n. 1 (1982). While the FCC considers the terms BSS and DBS as synonymous, it uses the term DBS "when discussing domestic policy matters and BSS with regard to frequency allocation matters." *Id.* Broadcasting-Satellite Service is defined in the FCC regulations as a "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public. *Note*: In the broadcasting-satellite service, the term 'direct reception' shall encompass both individual reception and community reception." 47 C.F.R. §2.1 (1984). For definition of "Direct Broadcast Satellite Service," see 47 C.F.R. §100.3 (1984).

[33] 47 C.F.R. §2.106 and NG139 (1984). The frequency allocation plan adopted for Region 2 of the 1983 Regional Administration Conference for the Planning of the Broadcasting-Satellite Service, and reflected in the FCC Table of Frequency Allocations, may be incorporated in the ITU Radio Regulations at

An interesting new development in satellite technology and functions is the discovery in recent years that some spare capacity in what were considered space stations in the fixed-satellite service could be used to transmit directly to individual receivers. The FCC permitted this sharing of

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the August 1985 World Administrative Radio Conference.

34. Report and Order, supra note 7, at 780.

35. National Ass'n. of Broadcasters v. F.C.C., 740 F.2d 1190, 1222 (D.C. Cir. 1984).

FSS and BSS services as long as the users remain within set technical parameters, e.g., decibel levels. A 1982 grant by the FCC to GTE Satellite Corporation (GSAT) to lease transponders on a Canadian communications satellite in order to provide a broadcasting-satellite television service in the 11.7-12.2 GHz band formerly reserved for fixed (point-to-point) satellite service was upheld in a court challenge brought by United States Satellite Broadcasting Co., Inc. The Court found that GSAT had disclosed in its application "that it had signed an agreement to lease capacity to United States Television (USTV) which planned to provide television programming to 'small CATV [cable-TV] systems, hotels, motels, hospitals, low power TV and STV [subscription television or "pay TV"] and MDS [multipoint distribution service] operations as well as multiple and single dwellings.'"36/ It is now recognized in the United States that broadcasting-satellite service may be provided for direct to home reception of television and radio programming using either medium or high power geostationary satellites.

While technically feasible, direct to home satellite broadcasting has proven very costly. One of the few operational systems, United States Satellite Communications Inc. (USCI) recently filed for Chapter 11 bankruptcy protection. USCI had provided a five channel Ku-Band service since 1983 using Telesat Canada's Anik C-II. Only

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36. United States Satellite Broadcasting Co. v. F.C.C., 740 F.2d 1177, 1181 (D.C. Cir. 1984).

Hubbard Broadcasting's United States Satellite Broadcasting, Direct Broadcasting Satellite Corp., and Dominion Video Satellite are still planning to build and launch high power direct broadcast satellite systems; and the FCC has granted DBS permits to Satellite Syndicated Systems, National Christian Network, Advanced Communications Corp. and Hughes Communications Galaxy Inc.[37] Interest has been expressed, however, by many cable systems and other enterprises in providing *medium* power broadcasting-satellite services. For several months, the cable industry has actively considered plans to scramble its satellite cable programming and sell the service to owners of dish antennas. It is reported that, in the last five years, over one million home dishes have been installed, and that the number is growing "at a rate of between 40,000 and 85,000 a month."[38] The service would be provided over the C-Band satellites now used to transmit programming to cable systems. At least one program distributor, HBO, has recently announced a marketing scheme for reception of satellite cable programming directly by individual earth station owners.[39]

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[37] *Direct broadcast satellites*, *Broadcasting*, at 22 (July 1, 1985).

[38] *Id.*

[39] *See, e.g.*, T. Girard, *Cable Biz Intensifying Effort to Scramble and Market Program Services*, *Daily Variety*, at 1 (June 7, 1985); and J. Boyle, *HBO Unveils plan to Sell its Services to Home Dish Owners*, *Multichannel News*, at 1 (May 6, 1985).

March 6, 1986

The Honorable Ralph Oman
Register of Copyrights
Copyright Office
Library of Congress
Washington, D.C. 20559

Dear Mr. Register:

In light of recent announcements that several common carriers are planning to encrypt secondary transmissions for possible resale to earth station owners, I thought it would be useful to inquire about the copyright ramifications of such encryption and potential resale.

In particular, would you analyze whether the provisions of 17 U.S.C. section 111(a)(3) bar scrambling or prohibit resale for descrambling and receipt of the transmission. I would appreciate an expeditious reply to this question.

Sincerely,

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:nrm

The Register

MAR 18 1986

March 17, 1986

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The Honorable
Robert W. Kastenmeier
Chairman, Subcommittee on
  Courts, Civil Liberties and
  the Administration of Justice
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Kastenmeier:

I write in response to your inquiry of March 6th regarding the application of the passive carrier exemption of section 111(a)(3) of the Copyright Act of 1976 to certain activities of satellite resale carriers. These activities involve the encryption ("scrambling") of secondary transmissions distributed via satellite, and the sale or rental of descrambling devices to satellite dish owners.

Section 111(a)(3) provides an exemption for passive carriers from liability for secondary transmissions of copyrighted works where the carrier "has no direct or indirect control over the content or selection of the primary transmission, or over the particular recipients of the secondary transmission...." Moreover, the carrier's activities with respect to the secondary transmission must "consist solely of providing wires, cables, or other communications channels for the use of others...."

As you will recall, the basic principle underlying section 111(a)(3) was incorporated into the Copyright Revision Bill early in the revision process. On January 27, 1966, Professor Derenberg, representing AT&T, wrote the House Subcommittee regarding what he believed was ambiguous language in the pending bill concerning the liability of passive carriers such as the telephone company. I have attached a copy of the letter. Professor Derenberg proposed a specific exemption for passive carriers, and his proposal ultimately became section 111(a)(3).

When Congress passed the Copyright Act of 1976, the FCC had not yet authorized the creation of satellite resale carriers. In *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), the Second Circuit held that Eastern Microwave's retransmission of station WOR (whose programming included 100 Mets baseball games) to cable systems fell within section 111(a)(3)'s passive carrier exemption. The court reached this conclusion under the text of the Act since it found the carrier merely retransmitted the signal without change and exercised no control over the selection of the primary transmission or recipients of the signal. In support of this interpretation, the court also cited your Subcommittee's comment in May 1982 in a legislative report accompanying cable copyright legislation that was not enacted. "There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities." H.R. REP. NO. 559, 97th Cong., 2d Sess. 4 (1982).

The Seventh and Eighth Circuits have also interpreted Section 111(a)(3). The former held the exemption inapplicable because the carrier changed station WGN's signal in its retransmission, by stripping the teletext information in the vertical blanking interval of the signal. *WGN Continental Broadcasting Company v. United Video*, 693 F.2d 622 (7th Cir. 1982). More recently, the Eighth Circuit held the carrier was exempt when it retransmitted WTBS's signal intact from a direct microwave feed supplied by WTBS, eventhough the content of the signal was not the same as that broadcast over the air by WTBS. *Hubbard Broadcasting v. Southern Satellite*, 777 F.2d 393 (8th Cir. 1985).

The courts have never addressed the question of whether or not satellite resale carriers can encrypt secondary transmissions and license descrambling devices, and the likely result of any litigation over the issue is necessarily a matter of conjecture. Where the resale carrier receives the signal already scrambled through a direct feed from the primary transmitter, one could argue that the carrier has not changed the signal in any way, and that the licensing of descrambling devices does not constitute control of the recipients. The practice might be defended as analogous to the existing practice of supplying some cable system with retransmission services, *i.e.*, those who pay, receive the service; those who do not pay are denied service.

The Copyright Office concludes, however, that the licensing of descrambling devices logically falls outside the scope of section 111. Congress neither approved, implicitly or explicitly, nor did it even contemplate this type of activity in granting the exemption to passive carriers, like telephone companies. The development of resale satellite carriers has been seen as a technological advancement that enabled cable systems to offer the programming that Congress authorized them to carry through section 111. The courts have relied on the broad general purpose of section 111 to justify many of the activities of the satellite resale carriers. In doing so they declined to construe strictly some of the requirements of section 111(a)(3).

However, in selling or renting descrambling devices to some earth station owners, the carriers would appear to exercise control over the recipients of the programming. This result seems especially clear where the carrier both encrypts the signal and then purports to provide access through descrambling devices. But for the encryption, the satellite dish-owners would be able to receive the signal on their own equipment. The carrier therefore controls who may receive the signal. Moreover, since licensing of descrambling devices would appear to be a far more sophisticated and active function than the passive function of merely providing "wires, cables, or other communications channels," even those carriers who seek to license signals encrypted by someone else would lose their 111(a)(3) exemption.

Therefore, I reach the preliminary judgment in this difficult and controversial area of the law, that the sale or licensing of descrambling devices to satellite earth station owners falls outside the purview of section 111(a)(3), particularly where the carrier itself encrypts the signal. The exemption failing, the resale carrier requires the consent of the copyright owner of the underlying programming.

Sincerely,

Ralph Oman
Register of Copyrights

Enclosure:
Derenberg letter

August 14, 1986

Mr. Ralph Oman
Register of Copyrights
U.S. Copyright Office
Library of Congress
Washington, D.C. 20540

Dear Mr. Oman:

I have enclosed a copy of H.R. 5126, the Satellite Home Viewer Act of 1986. This bill would amend the Copyright Act of 1976 to provide a temporary compulsory license for satellite carriers to retransmit superstations for private viewing by earth station owners. The Subcommittee on Courts, Civil Liberties and the Administration of Justice would appreciate the written comments of the Copyright Office on the merits of the bill.

Sincerely yours,

Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:mra
Enclosure

The Register

File H.R. 5126

August 29, 1986

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The Honorable
Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil
Liberties and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am pleased to respond to your letter of August 14, 1986 requesting the comments of the Copyright Office on the merits of H.R. 5126, the Satellite Home Viewer Act of 1986. I support passage of the bill and hope that its enactment will in the long term assist in the development of marketplace solutions to the licensing of satellite-delivered broadcast signals.

Sincerely,

Ralph Oman
The Register of Copyrights

COMMENTS OF THE U.S. COPYRIGHT OFFICE
ON H.R. 5126
THE SATELLITE HOME VIEWER ACT OF 1986

The Satellite Home Viewer Act of 1986, H.R. 5126, was introduced by the Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Robert W. Kastenmeier, and Representative Synar, Representative Wirth and Representative Boucher on June 26, 1986. This bill would create a temporary compulsory license for satellite resale carriers that retransmit superstations for private viewing by earth stations owners.

Background

Since the enactment of the Copyright Act of 1976, developments in satellite technology and changes in FCC communications policy have had a marked impact on the way in which the American public receives television programming. Satellite resale carriers distribute "superstations" like WTBS (Atlanta) and WOR (New York) nationwide via satellite to cable down links, and, similarly, other entrepreneurs have created a galaxy of new cable programming services for distribution via satellite to cable systems, and the home subscriber. The technological development of the home earth station fostered the emergence of yet another programming audience: home dish owners whose backyard dishes intercept these satellite delivered signals.

While cable systems have traditionally paid satellite carriers a per subscriber fee for delivering the broadcast or pay cable signal that they then send out over the wire to their subscribers, dish owners who received these signals have paid no fee, since it was heretofore impossible for the carriers to monitor who was receiving the signals. In order to impede this unauthorized reception of their satellite-borne signals, some copyright holders and resale satellite carriers have started to, or intend to, encode, or scramble, their signals.

The issue of scrambling satellite signals has inspired reaction from two differenct sources. Some home earth station owners object to scrambling because they believe they have a right to receive satellite programming at a price comparable to that paid by cable subscriber recipients of the same programming. Once the satellite resale carriers begin to scramble the signals they deliver, and begin to market decoding devices to home dish owners, however, they may lose their exemption under section 111(a)(3) of the Copyright Act, and may be liable for copyright infringement for publicly performing copyrighted programming. It is this latter point that prompted the conception of H.R. 5126.

Under the Copyright Act of 1976, the retransmission of a broadcast signal embodying a performance or display of a copyrighted work by a carrier is not an infringement if the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission," and if the carrier's activities with respect to the primary transmission "consist solely of providing wires, cables, or other communications channels for the use of others."1/ In interpreting this provision, the U.S. Court of Appeals for the Second Circuit, in Eastern Microwave Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1932), held that a carrier's retransmission of station WOR to cable systems fell within the section 111(a)(3) exemption, since it found that the carrier merely retransmitted the signal without change and exercized no control over the selection of the primary transmission or recipients of the signal. However,

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1. 17 U.S.C. §111(a)(3) (1976).

the courts have never addressed the question of whether a satellite resale carrier can scramble secondary transmissions and license decoding devices to home earth station owners and still retain the section 111(a)(3) exemption.

Congress neither approved, implicity or explicity, nor did it even contemplate this type of activity in granting the exemption to passive carriers. The Copyright Office has taken the position that, in selling, renting, or licensing descrambling devices to earth station owners, the carrier would appear to exercise control over the recipients of the programming. Moreover, licensing of descrambling devices would appear to be a far more sophisticated and active function than the passive function of merely providing "wires, cables, or other communications channels." Therefore, in response to public and Congressional inquiry, the Copyright Office has concluded that the sale or licensing of descrambling devices to satellite earth station owners falls outside the purview of section 111(a)(3), particularly where the carrier itself encrypts the signal.

If a carrier is not exempted from copyright liability under section 111(a)(3) because it engages in the sale or licensing of descrambling devices, the carrier requires the consent of the copyright owners of the programming embodied in the signal it retransmits. To facilitate satellite carriers' compliance with the copyright law, and to balance the interests of copyright owners, cable systems, satellite carriers, and the viewing public, several members of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, and Representative Wirth of the Subcommittee on Telecommunications introduced H.R. 5126.

Major Provisions of H.R. 5126

H.R. 5126 would amend the Copyright Act to provide for an eight year compulsory license for satellite carriers that retransmit superstations for private viewing by earth station owners. The terms of the new compulsory license would be set out in a new section 119.

The section 119 compulsory license would apply where a secondary transmission of the signal of a superstation is made by a satellite carrier to the public for private viewing, and the carrier makes a direct charge for such retransmission service to each subscriber receiving the secondary transmission, or from a distributer, such as a cable system, that has contracted with the carrier to deliver the retransmission directly or indirectly to the public for private viewing. The compulsory license would not apply, and a satellite carrier would be liable for copyright infringement, in instances in which (1) the satellite carrier does not deposit the statement of account and royalty fee required by section 119; (2) the content of the programming or commercial advertising or station announcements embodied in the signal retransmitted is in any way willfully altered or deleted by the satellite carrier; or (3) the satellite carrier discriminates against any distributor in a manner which violates the Federal Communications Act of 1934 or the FCC rules.

The section 119 compulsory license would operate in much the same way as the section 111 cable compulsory license. However, under section 119 the method for determinining a royalty fee is unique. The bill would allow the copyright owners, satellite carriers, and distributors voluntarily to negotiate a fee for the compulsory license. If the parties do not previously set a fee by voluntary negotiation, the bill provides a statutory fee of 12 cents per subscriber per secondary signal delivered that would apply for the first four years that the compulsory license is in effect. Prior to expiration of the first four year period (January 1, 1987 until December 31, 1990), the bill requires the parties to attempt to negotiate a fee for the second four year period of the license (January 1, 1991 until December 31, 1994). If some or all of the parties do not voluntarily negotiate a fee, the bill requires the parties to engage in compulsory arbitration to determine a fee for the second period. A rate decided by compulsory arbitration is subject to judicial appeal to the United States Court of Appeals for the District of Columbia Circuit.

The bill would allow satellite carriers to contract with distributors, such as cable systems, to market their services and collect royalties. However, the satellite carrier remains responsible under the bill for filing statements of account and paying royalties for services provided under the section 119 compulsory license.

Section 119 contains definitions for the following terms: antitrust laws; distributor; primary transmission (same as the 17 U.S.C. §111 definition); private viewing; satellite carrier; secondary transmission (same as the §111 definition); subscriber; and superstation.

Copyright Office Conclusions

The introduction of H.R. 5126 demonstrates concern on the part of the bill's proponents that copyright owners receive adequate compensation for the additional public performance of their programming by satellite carriers that scramble broadcast signals and further market the signals to home earth station owners. The Copyright Office shares that concern and supports the public policy objective of encouraging satellite carriers to pay royalties for their use of copyrighted programming.

Under ordinary circumstances, the Copyright Office advocates a marketplace solution to a copyright licensing problem wherever feasible. However, the Office recognizes that it is not immediately feasible for carriers to create a marketplace structure for the purchase of programming licenses for the works that are currently being retransmitted via satellite and that will soon be marketed on a scrambled signal. Accordingly, the Office supports the short term solution afforded by H.R. 5126. Because the compulsory license that would be established by H.R. 5126 is of a short duration, and is merely intended to provide compensation to copyright owners during the interim period in which a marketplace mechanism for negotiating programming licenses is evolving, the Office concludes that the bill is an appropriate solution to a difficult problem. Futhermore, the bill's mechanism for setting the second term rate by encouraging voluntary negotiation, and in the alternative mandating arbitration, provides a first step toward the establishment of the marketplace solution that should ultimately develop.

The Copyright Office realizes that in the coming weeks, H.R. 5126 may be amended by the Subcommittee. The Copyright Office recommends that the duration of the section 119 compulsory license be shortened from eight to six years, with a three year period for the 12 cents per subscriber per signal rate to apply and a three year period for the negotiated or arbitrated rate to apply. This would force the parties to expedite the development of a free market licensing mechanism.

In addition, the Office recommends that the Subcommittee reexamine the definition of "subscriber" in proposed section 119(d)(7). As it is presently defined, the term "subscriber" would include individual dwelling units in multiple unit buildings that receive satellite signals. These buildings generally receive transmissions from satellite master antenna television (SMATV) systems. With increasing frequency, SMATV operators have sought to use the compulsory licensing provisions of section 111 of the Copyright Act to satisfy their copyright obligations for retransmitting the signals of television broadcast stations. While the Copyright Office has not taken any position on the eligibility of SMATV operators to invoke the section 111 cable compulsory license, the Office accepts statements of account filed and royalty fees deposited by SMATV operators for whatever value they may be held to have by a competent court. The Office urges the Subcommittee to consider carefully whether or not it is appropriate to define the recipients of SMATV services as "subscribers" under the proposed section 119 compulsory license while the issue of whether or not SMATV systems are "cable systems" under section 111 is still unsettled.

The Copyright Office is impressed with the spirit of innovation tempered with caution that has characterized the development of H.R. 5126, and concludes that the timely passage of the bill, with minor modifications, would serve the public interest. The bill entrusts new responsibilites to the Copyright Office relating to the voluntary negotiations and compulsory arbitration procedures, and the distribution of the royalty fees. The Office is aware that it has been suggested the Copyright Royalty Tribunal should be given some or all of these responsibilities. On this point, the Office defers to the judgment of the Congress. We are prepared to carry out whatever duties Congress mandates, but we do not seek them. The Copyright Royalty Tribunal would be an appropriate alternative.

National Cable Television Association

James P. Mooney
President &
Chief Executive Officer

1724 Massachusetts Avenue Northwest
Washington D.C. 20036
202 775-3550

September 16, 1986

Honorable Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Civil Liberties, &
The Administration of Justice
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman,

As a result of representations made by other industries, there seems to be some uncertainty as to the position of the National Cable Television Association on H.R. 5126, the Satellite Home Viewer Act of 1986. NCTA is not opposed to passage of H.R. 5126.

As you know from both our private discussions and my testimony we feel that it is necessary to bring the Copyright Act up to speed with the latest technology. In doing so it is only equitable that backyard dish owners have access to the same distant signals as do cable subscribers.

We have reviewed the Subcommittee's Discussion Draft of September 12, 1986. Even though it does not reflect the major recommendations which we made in our testimony, our position remains the same. We do not oppose passage of H.R. 5126.

Sincerely,

James P. Mooney

James P. Mooney

SATELLITE TELEVISION VIEWING RIGHTS COALITION, INC.
Post Office Box 18333, Washington, D.C. 20036

General Counsel: Richard L. Brown
1800 M Street, N.W., Suite 570
Washington, D.C. 20036
(202) 887-0600

September 16, 1986

The Honorable Robert Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties, and the Administration
of Justice
Committee on the Judiciary
2137 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Mr. Chairman:

It is our understanding that H.R. 5126 is scheduled to be marked-up by your Subcommittee tomorrow. We strongly support the bill which you and the co-sponsors have drafted. The bill will clarify the rights of individual homeowners to obtain access at a fair price to the satellite delivered broadcast television programming which is available to others. The bill, as drafted, represents a fair and balanced effort to compromise a variety of conflicting interests. It maintains the consumer's access to television service while establishing a means of compensation for copyright interests, thereby encouraging their continued creativity.

It is our understanding that several large special interest groups are now seeking to amend parts of the bill to restrict the rights of home dish owners. We are concerned about efforts that establish a threshold of access by satellite dish users to new superstations based on their availability to 10% of cable subscribers. By way of reference, most of the existing superstations are not currently available to that many cable subscribers. Inclusion of this threshold will restrict the uses of home satellite dishes and foster a further competitive imbalance between the home satellite industry and the cable television industry. This amendment would, in effect, serve to protect industries which do not need protection while restricting access to underserved Americans. We see no reason to impose such an artificial restriction.

Should the Subcommittee feel that such a restriction is necessary, we would urge a provision grandfathering superstations which were uplinked within 180 days of enactment of the legislation. Should the Subcommittee wish to tie the future availability of superstations to dish owners to their availability to cable television subscribers, we would urge a threshold be set at 2-1/2 percent which is closer to, but still exceeds, the current availability of several of the superstations to cable television subscribers.

It is also our understanding that the networks have registered an objection to the inclusion of network affiliates as "superstations". We believe that all Americans who have the capability of receiving network signals should continue to be able to do so. We do not wish to unreasonably interfere with the network and local station relationship.

But don't confuse true cable services with Superstation "carriers." The latter have no proprietary rights in the programming they carry and pay nothing to get it. Their sources of programming are the free, unscrambled, over-the-air signals of local television stations. They take this programming and retransmit it into markets across the country -- markets in which the exclusive rights to the same programming have already been sold to a local station in that market.

By allowing Superstation "carriers" to scramble these signals, the federal government would be condoning the taking of a *free service* and turning it into a *pay service*. Or, put another way, the Superstation "carriers" want the Congress to bless the practice whereby a "carrier" can steal a station's signal, then scramble it to keep someone else from stealing it from them!

Solution: Prohibit Superstation Scrambling

Rather than needing a 20 page bill to create another complex and convoluted compulsory license to allow Superstaion scrambling, Congress should simply prohibit it. (NOTE: This would *not* include true cable program services.) INTV has proposed to amend Section 111 of the Copyright Act with a few words (see attached) in lieu of H.R. 5126. Remember, these Superstation "carriers" only stay in business because of the "passive carrier" exemption, which amounts to a substantial governmental subsidy. A prohibition on scrambling is a small price to pay for this privilege of operating outside of the normal marketplace for copyright licenses.

In short, we believe this is a fair solution. It's fair to home dish owners and its fair to Superstation "carriers" (after all, if none can scramble, the cable industry cannot play one off against the other).

Most importantly, from our standpoint, if the Superstations are not scrambled, there will be no need to amend the copyright laws to dis-honor our exclusive program contracts.

A Network Amendment to H.R. 5126 Would Be Grossly Unfair

The big three networks -- ABC, CBS and NBC -- are attempting to amend H.R. 5126 to exempt themselves. In other words, "carriers" would have a compulsory license to steal, scramble and sell the signals of Independent stations, but not network affilates. We hope the Congress will see this for what it is: a transparent, self-serving attempt to gain special treatment for networks over Independents. It is wrong for the signal of *any* station, network or Independent, to be uplinked to a satellite and hurled around the country without the station's permission.

September 1986

For this reason, and to the extent that the Subcommittee is sympathetic to the network view, we would suggest that carriers be permitted to market network affiliates to dish owners who are outside of either the predicted or actual reception area of a network affiliate.

Again, we wish to reiterate our support for the efforts of the Subcommittee as embodied in H.R. 5126 to resolve these issues. The Subcommittee has taken a leading role in addressing a matter of critical importance to millions of Americans who depend, for access to information and ideas, on direct satellite reception. We look forward to mark-up of the bill and working with you to achieve passage of this important legislation this year.

Sincerely,

Richard L. Brown
Counsel to the Satellite Television Viewing
Rights Coalition

RLB:mlt

cc: All Subcommittee Members

1771 N Street, N.W.
Washington, D.C. 20036

National Association of Broadcasters

Edward O. Fritts
President & CEO
(202) 429-5444

September 10, 1986

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties and
The Administration of Justice
2137 Rayburn House Office Building
Washington, D. C. 20515

Dear Chairman Kastenmeier:

I understand the Subcommittee on Courts, Civil Liberties and the Administration of Justice will soon meet to mark-up H.R. 5126, the Satellite Home Viewer Act of 1986. The National Association of Broadcasters wishes to express its opposition to this expansion of the compulsory license currently enjoyed by passive satellite carriers.

We view the compulsory license contained in Section 111 of the 1976 Copyright Act as an extraordinary form of copyright preference. The reasons cable television was accorded that preference have been debated extensively and it is not our purpose to continue that debate here. We only wish to ask why satellite carriers should be given an even broader license than contained in the 1976 Act. Are they a struggling infant industry? Did they exist prior to the creation of their compulsory license, as cable did? Can they not negotiate in the open marketplace for the programs they retransmit, just as the broadcasters negotiated for those very programs?

Our system of free television is based upon the concept of distinct markets. It draws its strength from the individuality of those markets. Programming rights are purchased on a market basis. To the extent those rights are undermined by the extraordinary copyright preference of compulsory licenses, those markets become less distinct and eventually could cease to exist for purposes of program contracts. This seems to us to be the very antithesis of copyright law.

In rare cases, compulsory licenses have been granted to preexisting industries for extraordinary reasons. The satellite carrier industry, however, was actually an outgrowth of the compulsory license itself — and at the expense of all those who must vie in the open marketplace against the programming distributed by those carriers.

Mr. Chairman, we compete in a very complex and sometimes unfair arena. We can't envision the need for more compulsory licenses or expansions of those existing licenses. H. R. 5126 is a step in the wrong direction and we oppose its enactment.

Sincerely,

Edward O. Fritts

cc: All Subcommittee Members

INTV

PRESTON R. PADDEN
President

September 4, 1986

The Honorable Robert W. Kastenmeier
U.S. House of Representatives
2328 Rayburn House Office Bldg.
Washington, DC 20515

Dear Mr. Chairman:

When Congress reconvenes, the Courts subcommittee will mark-up H.R. 5126, the so-called "Superstation scrambling" bill. For reasons outlined in our August 4th letter to you (copy attached), INTV strongly opposes this legislation and seeks your help in defeating it.

We are also attaching a recent article from the *New York Times* which details how Independent stations are suffering from skyrocketing program costs. H.R. 5126 would add insult to this financial injury by granting yet another party -- the Superstation carrier -- a compulsory license to exhibit in *our* markets the very *same* programming which our stations have purchased on an *exclusive* basis in the open market. Worse yet, the only "need" for this legislation is to pacify the cable industry's relentless pressure on Superstation carriers to scramble their retransmissions in order to diminish competition from backyard dish owners.

Exclusive program contracts negotiated and paid for in the open market by Independent stations deserve the recognition and protection normally available under the copyright laws. For this reason we ask you to oppose this legislation.

We believe the concern over home earth station owners can be met by a short addition to Section 111 which would make it illegal for carriers to scramble free, over-the-air broadcast signals and still qualify for the "passive carrier" copyright exemption. We would ask that you support this language as a substitute for the new and convoluted compulsory license contained in H.R. 5126.

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.
1200 EIGHTEENTH STREET, N.W. WASHINGTON, D.C. 20036 (202) 887-1970

Finally, we are concerned that the subcommittee may adopt an amendment on behalf of the three networks which would prohibit a carrier from turning a network affiliated station into a Superstation. The networks argue that bringing network programming into a market on a Superstation would severly harm the local affiliates who have exclusive licenses to exhibit the network fare in their local markets. While we completely agree with the networks' reasoning, it is inconceivable to us that the Congress would recognize and respect the exclusive programming licenses of network affiliates while ignoring those of Independent stations! In short, there is no public policy basis for distinguishing between network programs and Independent programs in the context of this legislation. People who want to hurl programs of any kind up onto a satellite for distribution across the country should first acquire the necessary rights to those programs.

Thank you for your consideration.

Best regards,

Preston

Preston R. Padden

PRP:g

Enclosures

INTV OPPOSES H.R. 5126 -- SUPERSTATION SCRAMBLING BILL

Description:

This bill would allow the satellite "carriers" of superstations to begin scrambling their transmissions and selling descrambling rights to home earth station owners (who now receive the signals free of charge).

Definitions:

- A SUPERSTATION is nothing more than a local television station whose free, over-the-air signal has been taken by a "carrier" and distributed by satellite to cable systems across the United States. The local station cannot prevent these third-party "carriers" from taking its signal and selling it to cable operators (who, in turn, charge their subscribers to see it).
- Superstation "CARRIERS" are the companies that take a local TV signal and use a satellite to deliver it to cable systems. These "carriers" (United Video, Eastern Microwave, Southern Satellite) are able to steal the signals of local broadcasters without permission and without copyright liability by hiding behind a provision of the 1976 Copyright Act (Sec. 111(a)(3)) which exempts from liability "passive common carriers." In fact, when a company like United Video distributes New York Independent station WPIX by satellite, the passive common carrier is actually RCA-Americom, the company which owns the satellite and operates it as a common carrier.

H.R. 5126 is Not Needed to Help Home Dish Owners

Right now, home dish owners can freely receive Superstation signals. However, the cable industry reportedly has mounted relentless pressure to force the scrabling of all cable program services, including the Superstations.

Passage of H.R. 5126 will facilitate the scrambling of the Superstations but is not needed to aid home dish owners.

What's Wrong With Scrambling?

For true cable services, the answer is "nothing." Although there is a continuing dispute about how and under what terms and conditions descrambling rights are sold to home dish owners, we don't question the right of true cable programming services to scramble. These services -- such as HBO, ESPN, CNN -- go out into the open market and buy or create the programming they then distribute by satellite. These servies do not hide behind a compulsory license or passive carrier exemption to gain access to programming: They negotiate for it and buy it!

OVER.....

INTV

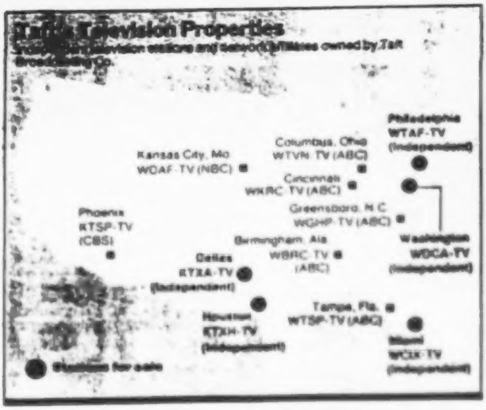
PROPOSED LEGISLATIVE LANGUAGE TO CLARIFY THAT SUPERSTATION "CARRIERS" MAY NOT SCRAMBLE THEIR RETRANSMISSIONS AND STILL QUALIFY AS "PASSIVE COMMON CARRIERS". LANGUAGE WOULD BE A COMPLETE SUBSTITUTE FOR THE TEXT OF H.R. 5126

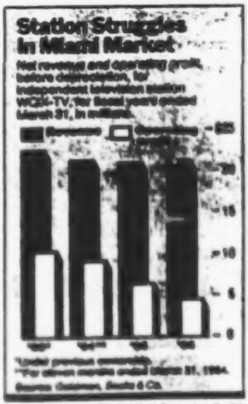
Title 17, Section 111(a)(3), United States Code is amended by inserting after the words "the particular recipients of the secondary transmission" the following:

"who does nothing to alter or encrypt the secondary transmission,".

September 1986

NEW YORK TIMES -- 28 August 1986


Taft's Television Properties
Television stations and network affiliates owned by Taft Broadcasting Co.
Philadelphia
WTAF-TV
(Independent)
Columbus, Ohio
WTVN-TV (ABC)
Kansas City, Mo.
WDAF-TV (NBC)
Cincinnati
WKRC-TV (ABC)
Greensboro, N.C.
WGHP-TV (ABC)
Phoenix
KTSP-TV
(CBS)
Birmingham, Ala.
WBRC-TV
(ABC)
Washington
WDCA-TV
(Independent)
Dallas
KTXA-TV
(Independent)
Tampa, Fla.
WTSP-TV (ABC)
Houston
KTXH-TV
(Independent)
Miami
WCIX-TV
(Independent)
Stations for sale



*Under previous ownership.
**For eleven months ended March 31, 1984.
Source: Goldman, Sachs & Co.

The New York Times / Aug. 28, 1986

Independent TV Gets Tighter

By GERALDINE FABRIKANT

Two years ago, independent television stations were beaming a bright picture. With a bigger share of television advertising dollars and improved ratings, they were giving the networks more of a run for their money than ever.

But as more and more entrepreneurs decided to get a piece of the action, television advertising in general started to level off. Now, the rising number of new independent stations and sluggish ad dollars have combined with unexpected rises in the cost of programming to dampen the outlook for many of the nation's 200 independents.

Nowhere is that clearer than in the financial data for several of the five stations that the Taft Broadcasting Company has recently put up for sale. At WCIX-TV in Miami, for example, profits have dropped to $4.6 million, from $10.4 million, in four years as advertising revenues flattened, programming costs shot up and promotion costs soared.

Taft also faces problems in Dallas and Houston because of general depression in the markets and increased competition from newer stations.

'Problems Are More Intense'

"The problems are more intense for independent stations than for network affiliates," said Dennis Leibowitz, an analyst at the Donaldson Lufkin & Jenrette Securities Corporation.

"There are not the same programming cost pressures on affiliates," he noted, "because they get the bulk of their programming from the networks. And the addition of a new independent in a market that already has several is much more severe on independents than affiliates." The high programming budgets of the networks allow them to attract at least two-thirds of the audiences, leaving the independents to divide the remainder.

Only one of the stations Taft is selling, WTAF-TV in Philadelphia, had consistent growth in operating profits. For the rest, results have been weak over the past several years.

For example, WCIX saw its operating profit before depreciation plummet nearly $6 million from fiscal 1983 to the fiscal year that ended March 31, while revenues — $22 million in 1983 — fell slightly in that period.

"The station had undoubtedly suffered from increased competition and increased program costs since Taft bought it," said Howard Stark, an independent television station broker who sold Taft the Miami station in 1983. "It is one of the most competitive stations in the market."

WCIX has several things going for

Continued on Page D17

OVER..........

The Tightening Market For Independent TV

Continued From First Business Page

it, however. It is a VHF station, which means it has better placement on the dial and a stronger signal. And it is still the leading independent in Miami in market share, the number of homes with viewers watching television.

Three New Independents in Miami

Nevertheless it is facing increased competition. Three independents have come to Miami in the past five years. WBFS-TV, a UHF station that only came on the air in November 1984, is now getting a seven share in recent Nielsen data, compared with an eight share for WCIX. The new channel, launched by Milton Grant, an entrepreneur, had a four share in its first year.

Additionally, Odyssey Partners, an investment group, has started WDZL-TV, also an independent, which is getting a five share.

As a result of increased competition, key cost factors have escalated at WCIX. Independent stations, which cannot depend on the networks for their programming, have to bid heavily for outside shows, particularly reruns of old network series. The bidding has become highly competitive, so that at WCIX, programming costs jumped to $7.7 million in fiscal 1986, from $4.4 million in fiscal 1984.

The other major price increase has been expenditures on promotion and publicity, which rose to $1.2 million last year, from $620,300 in fiscal 1984.

Market Saturation Noted

"There are simply more stations than the market can support," said one broadcast executive who asked not to be named. "The stations are still making money. The problem is that the value of the station has declined in terms of absolute numbers. It might have been worth $80 million or $90 million. Now it is worth $40 million or $50 million."

Because of the large Hispanic audience in Miami markets, there are also several Spanish language stations, and they too have had an impact.

"Miami is a unique market because the two Spanish-language stations may not directly erode the English-language advertising pool, but they take audiences away from the English-language stations," said Barry Lewis, a general partner at Sandler Capital Management. That reduces ratings, so that stations have a tough time raising advertising rates, he explained.

Problems in Dallas and Houston

WCIX is not the only bad news at Taft.

The Houston station, KTXH-TV, was launched only two years ago but has had a succession of owners. Started by two entrepreneurs, it was sold to the Gulf Broadcasting Company, which in turn sold it to Taft, which has now put it up for sale. From the data available, it appears that operating income has fallen dramatically.

The income picture is also poor at KXTA-TV in Dallas, which had operating income of $3 million for the seven months ended July 31, 1985, but saw its income drop to $1.6 million for the eight months ended March 31, 1986. Taft acquired the station in 1985.

Big Gains at Philadelphia Station

The best performer of the stations Taft is selling is WTAF-TV, in Philadelphia, where operating profits climbed to $11.6 million in fiscal 1986, from $5.6 million in 1982. That was despite an increase in programming costs to $13 million, from $6.7 million, in that period. Those added costs were more than made up by increased advertising dollars, which climbed to $40 million, from $17 million, from 1982 to 1986. Another factor helping WTAF was that there has been only one new independent station in Philadelphia in recent years.

Early last year there were 214 independents nationwide, compared with the 260 today. In addition, there are fewer shows available for reruns these days. Unless a series lasts at least three years, there are not a sufficient numbers of episodes to sell to the independents. As a result, stations are willing to pay top dollar for network hits.

The Inflation Factor

The slowdown in the inflation rate has also hurt independents, said David Londoner, an analyst with Wertheim & Company. Through 1984, they did particularly well because programming was bought for five-year periods at fixed costs, and inflation increased revenues and profit margins. But now, he said, "programming costs are more competitive and independents are not getting the inflation boost on the revenue side."

The total value of the five Taft stations, which include an independent station in Washington, was put it at $297.5 million by one broadcasting analyst.

INTV
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC., 1200 EIGHTEENTH ST., N.W. · WASHINGTON, D.C. 20036 · (202) 887-1970

August 4, 1986

AN ORIGINAL OF THIS LETTER WAS PERSONALLY ADDRESSED TO EACH MEMBER OF THE COPYRIGHT SUBCOMMITTEE

On Thursday, August 7, the Subcommittee on Courts, Civil Liberties and the Administration of Justice will hold a hearing on H.R. 5126, a bill which would create yet another compulsory license. This one would authorize the sale of scrambled "superstation" signals to home dish owners.

INTV vigorously opposes this legislation on the grounds that the original cable compulsory license needs to be amended before new ones are created. Moreover, as outlined in the attached testimony I will give on the 7th, we believe there is a far simpler short-term solution to the concerns of backyard dish owners.

Briefly, INTV's position is as follows:

1) The carriers of the local Independent stations called "superstations" are, in fact, active cable programmers and, as such, not entitled to the "passive common carrier" status which exempts them from copyright liability.

2) Changes in FCC regulations since the passage of the Copyright Act in 1976 give the compulsory license higher status than program contracts openly negotiated in the marketpalce. To wit: superstation carriers are allowed to deliver to cable operators programming from distant Independent stations even though local stations have negotiated for, and purchased exclusive local rights for that same programming. This effectively negates a major feature of these negotiated licenses. We simply do not believe Congress ever intended that the compulsory license would take precedence over negotiated licenses.

3) Until items #1 and #2 above can be corrected, the short term solution to superstation scrambling is to prohibit it. Unlike the scrambling of true cable services like HBO or ESPN (where the services have negotiated for

program rights), the superstation carriers have no rights whatsoever in the programming they retransmit. The passive carrier exemption gives these carriers the right to steal the programming of a local Independent station in the first place; now they want to scramble that programming to keep others from stealing it from them! What chutzpah!

Please understand that we are not taking a position on the scrambling of true cable services. We do, however, strenuously object to superstation carriers taking a free service (the over-the-air signal of an Independent station in its local market) and turning it into a pay service by scrambling.

While I hope you will be at the hearing on Thursday, we would very much like the opportunity of discussing our testimony in advance with your staff.

Sincerely,

Preston Padden

Preston Padden
President

PRP:s

Enclosure

APPENDIX IV

FURTHER MATERIALS RELATING TO EARTH STATION/COPYRIGHT

NINETY-NINTH CONGRESS
U.S. House of Representatives
SUBCOMMITTEE ON TELECOMMUNICATIONS, CONSUMER PROTECTION AND FINANCE
OF THE
COMMITTEE ON ENERGY AND COMMERCE
WASHINGTON, DC 20515

March 13, 1986

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
2137 Rayburn House Office Building
Washington, D.C. 20515

INSIDE MAIL

Dear Bob:

Thank you for your recent letter and the enclosed correspondence from your constituents regarding the satellite signal scrambling controversy. I appreciate your ongoing interest in this very important public policy issue.

As you know, the Subcommittee on Telecommunications examined some of the concerns arising from the scrambling of satellite-delivered programming at the hearings we held on March 6th.

Among the issues that were explored were the consumer confusion related to scrambling and the availability of decoder boxes, access by dish owners to broadcast network and superstation services, as well as the status of competition between the cable and backyard dish industries. To ensure that dish owners' concerns are fully addressed, a second hearing will also be scheduled for the near future.

I would be more than happy to keep you apprised of our deliberations over this important issue and accordingly, am sending you copies of all of the testimony presented at the hearing. Please do not hesitate to contact me if you have further questions or need more information.

With best wishes,

Sincerely yours,

Tim

Timothy E. Wirth
Chairman

TEW:cg

Enclosure

[illegible]

NINETY-NINTH CONGRESS

U.S. House of Representatives

SUBCOMMITTEE ON TELECOMMUNICATIONS,
CONSUMER PROTECTION AND FINANCE
OF THE
COMMITTEE ON ENERGY AND COMMERCE
WASHINGTON, DC 20515

[illegible]

"Ensuring Access to Programming
for the Backyard Satellite Dish Owner"

9:30 a.m.
2123 Rayburn House Office Building
March 6, 1986

WITNESS LIST

The Honorable Judd Gregg
U.S. House of Representatives
308 Cannon House Office Building
Washington, D.C. 20515

The Honorable Charles Rose
U.S. House of Representatives
2230 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Mac Sweeney
U.S. House of Representatives
1713 Longworth House Office Building
Washington, D.C. 20515

Panel I

Richard L. Brown, Esquire
Counsel
SPACE
Brown & Finn
Suite 510
1920 N Street, N.W.
Washington, D.C. 20036

Mr. James P. Mooney
President
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Mr. John B. Summers
Senior Executive Vice President
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Mr. Edward L. Taylor
Chairman and Chief Executive Officer
Tempo Enterprises, Inc.
Post Office Box 702160
Tulsa, Oklahoma 74170

Mr. Robert Redmond
Director
Associated Satellite Television Receive Owners
2530 South Park Road
Suite 600
Aurora, Colorado 80014

Mr. Cyril E. Vetter
President and General Manager
WRBT-TV
Post Office Box 14658
Baton Rouge, Louisiana 70898

Ms. Mary Lou Heinz
H & H Electrical Systems, Inc.
130 East Main Street
New Albany, Indiana 47150

Panel II

Mr. Michael Fuchs
Chairman and Chief Executive Officer
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1100 Avenue of the Americas
8th Floor
New York, New York 10036

Mr. Ronald Lightstone
Senior Vice President
Corporate and Legal Affairs
Viacom International, Inc.
1211 Avenue of the Americas
New York, New York 10026

Mr. John J. Sie
Senior Vice President
Tele-Communications, Inc.
54 Denver Technological Center
Denver, Colorado 80222

Mr. James F. Bunker
Senior Vice President
Corporate Marketing
M/A-COM, Inc.
7 New England Executive Park
Burlington, Massachusetts 01803

Mr. H. Taylor Howard
Director of Research and Development
Chaparral Communications
2360 Bering Drive
San Jose, California 95131

Mr. Steve Roberts
Consultant
Viewers First National, Inc.
2000 L Street, N.W.
Suite 702
Washington, D.C. 20036

STATEMENT OF THE
HONORABLE TIMOTHY E. WIRTH, CHAIRMAN
SUBCOMMITTEE ON TELECOMMUNICATIONS, CONSUMER PROTECTION AND FINANCE
"ENSURING ACCESS TO PROGRAMMING FOR THE BACKYARD SATELLITE DISH OWNER"
THURSDAY, MARCH 6, 1986

Good morning. Welcome to the Subcommittee on Telecommunication's version of Star Wars.

This morning we will discuss a subject that only a short time ago might have seemed like pure science fiction -- the ability of a consumer to put up a dish in his own backyard and receive over 100 channels of television programming beamed off a satellite over 20,000 miles away.

Today this fantasy is reality for almost two million Americans. In fact, the satellite dish has taken center stage so that it is now the leading consumer elctronics public policy issue of the day.

In focusing on that issue this morning, our hearings today are intended to accomplish two goals: first to look back over the past year since the enactment of the law I authored, with the help of my good friend Congressman Tauzin, formally legalizing the backyard dish, and second, to look ahead as to how we can continue to ensure access by dish owners to satellite-delivered programming -- and ensure access at competitive rates -- particularly as more and more programmers scramble their signals.

Unfortunately, in recent months, consumers have become increasingly confused and alarmed by the announcement of many cable programmers, as well as the broadcast networks, that they intend to scramble their signals. Many observers predicted that the skies appeared to be "going dark" for the backyard dish owner. I do not share this view. I believe the satellite dish industry will flourish. Simply put, it is too important a technology, providing too many benefits to the consumer, for its great promise to be squelched.

For example, because of the backyard dish, citizens in rural areas of my home state of Colorado like Sterling, Fort Morgan, or Yuma, now have access to the incredibly diverse television programming that previously was available only to those wired to a cable system. It can bring to citizens in Durango or Grand Junction, Colorado, two very mountainous areas, access to a mountain of programming -- programming so plentiful, it would take a viewer all three hours of prime time television to briefly sample each channel available to the dish owner. In fact, in 1986, dish owners have the ability to watch in a single night what would have been almost an entire year's worth of programming in 1966!

This Subcommittee has always championed the public policy goals of access and competition in telecommunications. These goals guided us when we authored the law legalizing the use of the backyard dish.

Now Congress must ensure that these basic principles are followed to fully protect the rights of the backyard dish owner in ensuring access to programming at competitive rates.

The backyard dish industry has come a long way in a very short period of time. Only a couple years ago, many believed a backyard dish owner was a pirate -- stealing programming he had no right to. The 1984 Act put an end to that ridiculous notion. Although scme industries did not want the backyard dish to be made legitimate, the supporters of my amendment thought these views were not legitimate -- that advances in technology should be fostered, not blocked; that people in rural and less populated areas should be given access to programming, not excluded from it.

So over the last fifteen months much has happened -- dishes have been legalized; a right of access to unscrambled signals has been established; most services that are scrambling say they intend to make their programming available to dish owners; and, a uniform scrambling technology seems to be developing which, we hope, will mean consumers will not have to purchase multiple decoders.

However, significant challenges remain. For instance, the question of price. At today's hearing we will look at how greater competition in the distribution of programming to dish owners can be achieved, and how that increased competition can lead to dish owners paying lower prices for access to programming. We will also look at how we can promote competition in the manufacture and sale of decoders so that the price of those devices can be forced down. As with any other communications market, consumers are only served if competition develops.

As to the question of access -- here, too, the dish owner faces challenges that I believe we all have a responsibility to solve. The broadcast networks and cable superstations are talking about scrambling their services and then not making it available to dish owners. That use of scrambling would deny consumers access to programming and so it raises some very serious questions.

It is my hope that putting the Congressional spotlight on these issues will greatly help to achieve our goals of ensuring access to programming at competitive prices for backyard dish owners. The Congressional spotlight has lit the path for much change already in this area. That spotlight continues to shine today and will do so again very shortly -- the Subcommittee will be holding another day of hearings on this important issue in the near future.

I want to thank all of our panelists for joining us this morning in this effort to ensure that the rights of backyard dish owners are protected.

Representative Peter W Rodino
U.S. House of Representatives
House Office Building
Washington, D.C. 20515

January 1, 1986

Dear Representative Rodino,

The purpose of this letter is to express our concern over what we see as the cable industries attempt to take control of the free airways. In addition, we would like to count on you support to help prevent the subtle infringements that will soon take place on our first amendment rights.

If you have not guessed already, we are an owner of a Television Receive Only (TVRO) Satellite System. We have a 10.5 foot satellite dish in our back yard and it is as ugly as hell. Many people can't understand why anyone would want such a huge, ugly and expensive piece of equipment just to get television.

If your were to believe many of the articles over the last year written by supporters of the cable industry, you might be led to believe that we spent over $4,000 just so we could save $30.00 a month and "pirate free cable". Obviously you don't need to be a CPA to add up the numbers and see that it wouldn't make sense. Based on our experience, there are three principle reasons why a TVRO owner spends the money, and many times the aggravation, to install a dish.

1. **Standard television reception is very poor or non existent.** This is true of a large part of the United States, particularly in the West and Mid-West. unbelievable as it may sound, over 3,000,000 homes in this country cannot receive any of the three major networks. Reception in our State runs from excellent to poor. In my area of Monmouth County it is reasonably good.

2. **Many people want a broader choice in programing but, either the service from their local cable company is poor or cable is not available in their area.** Colts Neck Township is rural and up to this writing it has not been profitable enough for a cable company to come to Town. Many people who do have cable in near by towns however, frequently complain about the quality of their picture, particularly during bad weather.

3. **There are many "High Tech junkies" out there in this country who are interested in the newest technology and inventions.** They were the first to buy transistor radios 25 years ago, one of the first to spend $65.00 on a 3 function calculator fifteen years ago and $3,000 on a Apple computer eight years ago. It is people from this group that, we believe, has enabled America to take the leadership role in technology today. They are the visionaries, scientists, engineers, inventors, innovators and the retail markets that have enabled our country to prove to the world over and over again that, "nothing is impossible". They live today but have their feet firmly planted in tomorrow.

Representative Peter W Rodino
U.S. House of Representatives
House Office Building
Washington, D.C. 20515

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Sure, I convinced my wife that our reception would be exceptional and we would always be able to see a good movie if we bought a dish. And she had difficulty saying no when I told her that the wide range of educational programing for the kids would be much better than having them constantly watching violence on the screen. But the real reason why I wanted a dish is because like many other people in New Jersey, I am a "high-tech junkie" and I want to be part of what shapes our future.

Clearly as an owner, I have a stake in the success of the TVRO industry but, as an American who has been brought up to expect the freedom of choice, I have a much bigger stake.

I will assume for the purpose of this letter that you are familiar with Bills 705 FCC Public Law 549 Oct/84 known as the Cable Policy Act, H.R. 1840, S. 1618 a companion to H.R. 1840 and known as the Television Viewing Rights Act of 1985 and H.R. 1769. **If you are not familiar with these bills you need to be!**

Here are the specific points that I would like to make:

SCRAMBLING

I believe, as does most dish owners, that a programmer should be able to make a reasonable profit on their investment. If HBO, Cinemax, ESPN, CNN or any other channel wants to scramble they have a right to do so. I don't believe that the advertised price of $395.00 for a descrambler and a monthly subscription fee of $12.95 for HBO, a $25.00 yearly fee for CNN or $19.95 for ESPN is reasonable considering what they charge Cable Operators for the same services. On average CNN charges cable operators $2.22 per year per subscriber and ESPN charges $1.56 per year per subscriber.

Why can't a TVRO owner be offered a yearly subscription rate at a discount price with a three year subscription at an even lower price. The magazine industry has been successfully doing this for years.

The entire scrambling situation is in confusion! HBO/Cinemax has spent almost 3 years and $15,000,000 to develop a "fool proof" addressable scrambler. By it being addressable, the programmer can turn your $395.00 descrambler off or on. Once it is turned on, they must send you a periodic signal to keep it on. Now this works great if you are a Cable company with a 24 foot fixed dish that stays on their satellite transponder 24 hours a day, but a TVRO dish can move to any of the nineteen satellites and 120+ transponders. What happens if I pay for their service and I'm not watching them when they send a signal to my descrambler? **I would pay for a service that I couldn't receive half the time. I guess that is why HBO/Cinemax only made 24,000 descramblers to sell to 1.5 million TVRO owners.**

I suspect that HBO/Cinemax has yet to learn the lesson that the computer industry has just begun to come to terms with. While they might put 50 or 100 of the greatest minds together to build what they feel is a unbreakable decoder, 150,000 electronic "amateurs" who have as much knowledge as "the experts" work on breaking the scrambling technique as a hobby. Much the same way most people enjoy working crossword puzzles. Apparently the HBO/Cinemax Video Cypher II scrambler was very complex, It took almost six months before the first illegal descrambler was made. It seems evident that the illegal descramblers which do need to be addressed to work, will hit the black market before you could even buy a legal one.

There are situations that are developing regarding scrambling that frankly, confuse me.
CBS has announced plans to scramble! NBC and CBS have announced that they are looking into scrambling.

Why would a national network that is advertiser supported and by charter, for the public good, want to scramble? I can understand scrambling network feeds to affiliates. But regular programing? I can turn on regular TV to view those stations, but what do the 3,000,000 households in the mid-west do when the only way the can get a network is by satellite?

CNN and other advertiser supported stations have announced plans to charge a fee for their unscrambled signal and indicate that they may scramble in the future.

Again, why would advertiser supported stations scramble? I thought that the more of an audience that a station had, the more the advertises would be willing to pay. When Ted Turner was recently asked why he was charging such a high fee for his unscrambled stations, his response was that his fee was barely covering the added cost of accounting. So the question is why would a programmer want to charge a fee if he knew he would not be making a profit from it and losing audience at the same time?

I urge to to vote for a two year moratorium on scrambling to allow for the industry to develop a fair and workable plan.

THE PROGRAMMERS RIGHT TO CHARGE A FEE FOR AN UNSCRAMBLED SIGNAL

Paragraphs 2i and 2ii in Section 5 of miscellaneous provisions 631 - 639 of the Cable Policy Act of 1984 make me a thief if I view a unscrambled signal if the Programmer wants to charge a fee. In addition it gives a Programmer the right to authorize an agent to set and collect the fee.

While this may sound "fair enterprising enough" these two paragraphs must either be repealed or new legislation passed to prevent us from giving away our First Amendment Rights! Imagine if station owners were allowed to charge a fee for VHF television or radio signals. If you did not pay a price you could not legally receive news, be current in political issues or even receive election results! What would happen if the poor would not be able to afford the right to receive information?

This issue has nothing to do with watching a movie or sports channel on television. I believe that it is about an organized effort of the cable industry to force programers into making them sole agents to set and collect fees. I believe their intent to monopolize the distribution of micro wave signals and ultimately, the power to determine what programing is available and who can see it. I don't feel that they are looking for power, they are simply looking to make money. If something is not done to change the law now, the cable industry will not only be making the money they seek, but by default, will assume the power. The handwriting is on the wall.

Based on articles in Satellite Orbit and other TVRO magazines, four months ago, only a handful of programers were planning to scramble. Many programers came right out and said that because of the cost involved they would not scramble. Today most have reversed their decisions. Just about every service that is distributed by cable has announced plans to sell their signal, even C-SPAN ! In every case The National Cable Television Association is the sole agent. They plan to bundle the services and sell them to dish owners there by restricting my freedom of choice. The whispers in the industry are that if prime Movie and Sports channels don't scramble producers won't do business with them. If programmers don't scramble or charge a fee for the signal and give distributions and collection rights to the Cable Industry, Cable will no longer carry their station! If you call HBO and want to buy a descrambler they will send to to a cable company to purchase it.

This is even more concerning and the ramification even greater if you look out 15 to 20 years and you see what my 10.5 foot Dish will evolve to. The dish will be less then two feet in diameter and unobtrusive on a roof. It will carry television programing on over 300 channels and countless radio channels. Most of home shopping and banking will be done through the video/telecommunications network through the dish. Needless to say, there will be a lot less telephone poles around the country. Many homes will have security systems that monitor for fire, gas and theft. The monitor will constantly transmit their status by dish to a regional facility and automatically notify the authorities if there is a problem. As the service industry continue to grow and cost of ongoing data communications becomes cheaper then transportation and office space, 30% or more of he working force will be able to work from home. Within 30 years I believe that we will have solar collectors hundreds of miles long in space that will convert sun light into electricity, electricity into micro-wave energy then transmit it directly to that two foot dish on the roof and converted back into the electricity needed to run your home.

Imagine the power of an organization that the NCTA could potentially grow into if it has total distribution rights of all those signals? We need to insure fair and competitive rights to distribution of satellite signals now when the industry is just beginning to grow.

While this issues surrounding this are complex, the core issue is clear. Should the business interest of the Cable Industry override basic rights of choice that have been a principal of our country from its founding.

As a Representative, you will either set the course for open and free air ways or you will help to give away future generations right of choice. I urge you to take an ACTIVE role in supporting fair satellite TV viewing rights and to help to repeal paragraph 2i and 2ii in the Cable Policy Act of 1984.

It would seem to me to be fitting that a Representative for the State of New Jersey join the leadership role that Senator Albert Gore forged in securing fair satellite TV viewing rights. After all, we are the State where the first communications satellite, Telestar I, was designed and constructed, where the the worlds most prestigious research facilities in satellite and telecommunications are located, and one that has the fastest growing high tech economies in the country.

I am am looking forward to hearing your position on this important and timely matter.

Sincerely,

Anthony Castelli

Anthony Castelli
16 Farmgate Drive
Colts Neck, New Jersey 07722

Office of the Commissioner
MAJOR LEAGUE BASEBALL

EDWIN M. DURSO
Executive Vice President
Legal and Administrative Affairs

August 25, 1986

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
& the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for offering Major League Baseball the opportunity to express its views on H.R. 5126, the Satellite Home Viewer Act of 1986.

As you know from many hearings, meetings and letters over the years, Baseball has always opposed the compulsory license that.was granted to cable television in the Copyright Revision Act of 1976. Yet each year we have worked diligently within the system created by the Copyright Act to collect our rightful share of the statutory royalties paid by cable systems (which we believe are a fraction of what the free market would generate). In short, we have always believed that the rules are unfair, but we have played by them.

Major League Baseball views H.R. 5126 as an unwarranted extension of those rules. Moreover, we believe the bill would do much more than just make parallel the laws covering the cable and TVRO industries. The concepts embodied in this bill are inconsistent with those in the current Copyright Act, in which the activities permitted by resale common carriers have been justified as involving merely the retransmission of broadcast signals unchanged from their original form. In H.R. 5126, resale carriers would be permitted to scramble and actively market to individual consumers the television programming of copyright owners. These activities are totally inconsistent with the passive carrier concept. Under the proposed legislation resale carriers would clearly be in the marketing business and should not be shielded from the marketplace.

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For these reasons Major League Baseball opposed H.R. 5126 as introduced. However, we understand the bill may well be amended in the Subcommittee, and hope Baseball will be able to support the final product. Therefore, in addition to our position with respect to the compulsory license, we urge your consideration of the following proposed changes in the bill as you proceed toward a mark-up. The following changes all assume that despite our objections a new compulsory license will remain in the bill.

(1) Recognizing that live baseball telecasts are perhaps the single most popular type of programming TVRO owners wish to receive, Major League Baseball believes that a provision establishing a separate royalty fee to be paid to us for the retransmission of baseball games only would be appropriate. This "baseball pool" would be distinct from the other payments to the copyright royalty pool anticipated in the bill.

(2) The provisions of FCC Rule 76.67, the Sports Blackout Rule, which with minor exceptions prohibit cable systems from showing sports events on distant signals within 35 miles of the event if it is not carried locally over-the-air, should be extended to TVRO owners also.

(3) The bill should prevent those distributing programming to earth station owners from combining parts of different signals into a "baseball station" and marketing it at the same rates as any other single station. Any such "cherrypicking" without the consent of the copyright owners must be prohibited.

(4) If a new compulsory license is established it must be limited to the reception of television signals by those living in individual dwelling units only. It must not be extended to commercial establishments or multiple dwelling units served by SMATV's.

(5) The sunset schedule should be shortened. The compulsory license should be abolished by the end of this decade.

(6) The number of superstations subject to scrambling and marketing by resale carriers under this regimen must be limited to those superstations currently in existence. In addition, the compulsory license must not be extended to DBS transmissions or any other form of satellite distribution to earth station users hereafter used or developed.

(7) We do not see the advantage to be gained by placing responsibility for distributing TVRO royalties with the Copyright Office while cable system royalties are distributed by the Copyright Royalty Tribunal. The experience of the CRT would be a plus for the administration of this system while the proposed division of responsibility would cause inefficiency and inconsistencies.

We appreciate your courtesy and that of the Subcommittee staff in affording us this opportunity to express our views, and urge your consideration of the points listed above. Baseball and its Washington representatives are available to work with you and your staff in the hope that the result of your deliberations will be a bill to which we may lend our support.

Thank you.

Sincerely,

Edwin M. Durso jps

Edwin M. Durso

EMD/jps

cc - Subcommittee members

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

22 SEP 1986

Honorable Peter Rodino
Chairman, Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Commerce, on behalf of the Administration, has reviewed H.R. 5126, the "Satellite Home Viewer Act of 1986," and urges that it not be reported favorably.

This bill would grant a compulsory license to carriers to enable them to retransmit to satellite dish owners the copyrighted material that is broadcast by television stations, provided the carriers pay royalties in accordance with a prescribed formula and meet certain other conditions. The royalties will be distributed by the Copyright Office. Neither the broadcaster nor the program producer/copyright holder could object to the retransmission or negotiate for compensation.

The license to transmit such signals to home viewers without fear of copyright liability would complement the carriers' present ability to transmit local signals to cable companies around the country without incurring copyright liability. This ability derives from court decisions that these carriers are "passive" within the meaning of the Copyright Act (17 U.S.C. 111(a)(3)). The bill indirectly endorses this construction. We do not. Even if we assume for argument's sake that the technical language of the exemption permits this construction, a carrier who can unilaterally decide to transmit the signals of a local station to cable companies willing to carry and pay for them, is actively marketing a product, not a mere transmission service. These activities are not passive in any commonly accepted meaning of the term. To the extent that Section 111(a)(3) permits a contrary interpretation, it should be altered. These carriers should negotiate for this privilege.

Instead, through the device of a compulsory license, the bill gives them an additional statutory right to transmit copyrighted material without having to bargain in the marketplace. The Department's National Telecommunications and Information Administration (NTIA) has consistently recommended elimination of the elaborate copyright scheme for cable television under which cable systems enjoy the right to retransmit any broadcast signal upon payment of only the royalty fees determined by the Copyright Royalty Tribunal.

The compulsory license concept is an unwarranted intrusion into the marketplace, whatever its theoretical justification may have been at one time. As NTIA has repeatedly demonstrated -- most recently in its 1985 report "Cable Retransmission of Broadcast Programs Following Elimination of the 'Must Carry' Rules" -- the compulsory license may hamper the development of cable networks and specialized program formats by broadcasters and reduce the incentive of cable systems to provide their subscribers more nonbroadcast options and viewing choices. It is little more than a subsidy to the cable industry and is inconsistent with the public policy goal of providing broader and more abundant choices to the public. We should not expand it. There is no reason why these copyright royalties should not be determined in the marketplace through negotiation among carriers, broadcasters and copyright holders.

In addition, the Department believes the bill is manifestly unfair to broadcasters who have entered into contracts for the exclusive rights to air a program in their particular market. Cable systems, by virtue of their compulsory license, can effectively "import" the same show into that market. The bill would further undermine the value of these "exclusivity" contracts in that it would permit the satellite carrier to market the same program to local dish owners upon payment of a low compulsory license fee.

The Office of Management and Budget has advised us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Douglas A. Riggs